IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1824

FLEMING S. JACKSON,
Petitioner,

vs.

STONE AND SIMONS ADVERTISING, INC., et al.,
Respondents.

## APPENDIX TO JURISDICTIONAL STATEMENT

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## APPENDIX TO JURISDICTIONAL STATEMENT

### INDEX TO APPENDICES

## APPENDIX A

United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson, Plaintiff, v. Stone & Simons Advertising, Inc., et al., Defendants. | Civil Nos.: 39071; 39072; 39073; 39074; and 74-70900. |

### ORDER DENYING PLAINTIFF'S MOTION TO REVERSE AND/OR SET ASIDE AND/OR VACATE VOID JUDGMENTS

The Court having previously entered judgments of dismissal in these actions and the plaintiff having appealed those judgments and the United States Court of Appeals for the Sixth Judicial Circuit having dismissed plaintiff's appeal on August 10, 1976; and it appearing that matters raised by plaintiff's Motion were or could have been raised in the prior proceedings in this action, the instant Motion Is Denied as untimely, not having been filed within twenty (20) days after judgment was entered; and

It Is Further Ordered that the Motion be, and it is, Denied on the Merits since it presents no new issues.

Dated: August 31, 1976

Detroit, Michigan

/s/ CORNELIA G. KENNEDY
United States District Court

## APPENDIX B

### OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IN PART

This Court, having been fully advised by plaintiff, acting in propria persona in Civil Actions Nos. 39071-39074, by plaintiff's counsel in Civil Action No. 74-70900, and by defendants' counsel in the oral hearings on defendants' Motions for Summary Judgment on November 19, 1973 and February 25, 1974, and having considered the briefs and materials filed by the parties hereto, including the affidavits in support of said motions, makes the following findings and conclusions of law:

**Findings**

1. This is an action for alleged copyright infringement and alleged conversion of plaintiff's copyrighted musical composition (words and music) entitled "Merry Christmas to You," United States Copyright Registration No. Eu 928,608;

2. Plaintiff alleges that a portion of his copyrighted work was used as musical background in a ten (10) second spot advertisement, recorded on video tape and broadcast by the defendant television stations;

3. The defendants in this action may be divided into four groups, as follows:

(1) The television stations which allegedly broadcast the accused advertisement using plaintiff's copyrighted music, including:

WXYZ-TV;
WXYZ-TV-Inc.;
WWJ-TV;
The Detroit News;



The Evening News Association;
WJBK-TV; and
Storer Broadcasting Company;

(2) The sponsor of the television accused advertisement, Meyer Jewelry Company and Meyer Rosenbaum as president;

(3) The advertising agency, Stone & Simon Advertising, Inc., which allegedly created and produced the accused advertisement on video tape for broadcast by the television stations; and

(4) The recording studio, Pioneer Recording, Inc. and Gary Rubin, as president, which allegedly had access to plaintiff's copyrighted music and where the accused advertisement was allegedly produced;

4. Defendants filed Motions for Summary Judgment based upon a contract between plaintiff and Broadcast Music, Inc. (BMI) dated prior to the alleged infringements and certain affidavits of BMI attached to defendants' motions as set forth below;

5. For the purposes of defendants' motions only, the facts alleged by plaintiff in his Complaints are presumed to be true, no proofs having been offered by plaintiff or received in evidence;

6. The contract between BMI and plaintiff dated July 9, 1968, and attached to defendants' Motions for Summary Judgment, grants to BMI:

(1) The exclusive right to perform "any part or all of the works . . . listed in Schedule 'A'" which includes the plaintiff's musical composition "Merry Christmas to You" the subject matter of this litigation [paragraph 4(a) of the BMI contract];

(2) The non-exclusive right "to record and license others to record any part or all of" plaintiff's copyrighted musical composition "on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio or television" [paragraph 4(b) of the BMI contract]; and

(3) The exclusive right to bring an action, as attorney for plaintiff, to enforce the rights granted in the Agreement [paragraph 13 of the BMI contract];

7. The affidavits of Theodora Zavin, senior vice president of BMI, attached to defendants' Motion for Summary Judgment, establish that:

(1) The Agreement between plaintiff and BMI was in force and effect at the time of the alleged infringement; and

(2) The television broadcasters [defendants' group (1) paragraph]

(3) were licensed by BMI under the Agreement between BMI and plaintiff at the time of the accused broadcast.

**Conclusions of Law**

1. The conduct and acts alleged against the television stations in the Complaints are within the copyright laws of the United States;

2. The contract between BMI and plaintiff [attached to defendants' Motions for Summary Judgment] constitutes a complete bar to any action against the television stations;

3. In view of the contractual relation between BMI and the television stations, the accused television performances of plaintiff's copyrighted music were authorized insofar as the television



stations were concerned, and they did not infringe plaintiff's copyright;

4. There can be no conversion of a musical idea which has been copyrighted; the only claim plaintiff has as to the musical idea is a claim under the copyright laws for the copying of his music;

5. The defendants' Motions for Summary Judgment as to the remaining defendants [groups (2), (3) and (4) paragraph 3 Findings of Fact] are denied, because defendants have failed to show:

(1) Permission or consent from the television stations to the remaining defendants so as to make them beneficiaries of the BMI contract; or

(2) A contractual relation between the television stations and the remaining defendants so as to make them beneficiaries of the BMI contract; or

(3) Custom or usage in the trade which would make the remaining defendants beneficiaries of the BMI contract;

6. The defendants have offered no evidence regarding the relation between the sponsor and the other defendants in this action, and therefore defendants' Motions as to the sponsor must be Denied.

A final judgment of dismissal is, therefore, Granted as to the defendant television stations, as listed in the above Finding.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: April 11, 1974
Detroit, Michigan

## APPENDIX C

### OPINION AND ORDER HEARING OF APRIL 15, 1974

This Court, having been fully advised by Plaintiff, acting in propria persona and by Defendants' counsel in the Oral Hearing of April 15, 1974 and having considered the Briefs and materials filed by the parties hereto, does Order, Adjudge and Decree, as follows:

1. Plaintiff's Motion to Amend the Complaints in Civil Action Nos. 39,071, 39,072, 39, 073 and 39,074 to include Paul Winter, the announcer in the accused advertisement, and Tru-Soul Publishing Company which is allegedly the publisher of Plaintiff's copyrighted music, is denied, because the three year federal Statute of Limitations has run. Amendment as to the alleged conversion is also barred by the state Statute of Limitations.

2. Defendants' Motion to Compel Production of Documents is granted as to items 1 to 14 and 16; the Court will reserve ruling as to the admissibility of the documents of item 16, based upon any claim of privilege-work product, but Plaintiff is required to produce such documents. The Defendants' Motion to Compel Documents as to item 15 is denied for lack of specificity. Plaintiff is required to produce such documents and things as specified in the Notice within ten (10) days of the Oral Hearing of April 15, 1974 or the above actions will be dismissed under Rule 37, FRCP.

3. Defendants' Motion for Attorney's Fees and Costs based upon the failure or refusal of Plaintiff to produce his Agreement with Broadcast Music, Inc. (BMI) and the concealment of such Agreement is granted, as follows:



(1) The attorney's fees and costs actually incurred by Defendants in obtaining the License Agreement between BMI and Plaintiff, including the Affidavits and necessary documentation.

(2) The attorney's fees and costs of Defendants' TV broadcasters in Civil Action No. 74-70900. The attorney's fees and costs may be apportioned between the Defendants on a numerical basis.

Defendants shall submit a statement of the attorney's fees allowed as set forth above.

4. Defendants' Motion to consolidate the Complaints is granted as to Civil Action Nos. 39,071, 39,072, 39,073 and 39,074. Plaintiff will be required to file a single Complaint listing all of his causes of action against the Defendants in such actions after the discovery period and the final Pre-Trial Conference. Civil Action 74-70900 will be consolidated with the other four actions for purposes of discovery only because that Complaint requests a jury trial.

5. Defendants' Motion to Defer Answers to Plaintiff's Request for Admissions until after a final Judgment upon Defendants' Motion for Summary Judgment is granted. This Motion was previously granted by the Court orally at a Pre-Trial Conference. Defendants are now required to answer or object to Plaintiff's Request for Admissions within the time set by Rule 36, FRCP, from the date of the Oral Hearing, April 15, 1974.

6. Plaintiffs' Motion for Summary Judgment is denied because the Motion is based upon alleged admissions in the Plaintiff's Request for Admissions and the failure of Defendants to respond. As set forth in paragraph 5 above, the Defendants' Motion to Defer Answers was granted and there are material questions of fact.

7. Defendants' Motion for Summary Judgment as to Meyer Rosenbaum is granted on the basis of the uncontested Affidavit

of Meyer Rosenbaum which establishes that Mr. Rosenbaum did not participate in the alleged infringement and Plaintiff has offered no reason why he should be held personally liable or why the corporate relationship should be pierced. Defendants' Motion for Summary Judgment as to Meyer Jewelry Company is denied because there is an issue of fact as to whether Meyer Jewelry Company had the right to control the content of the accused advertisement.

A final Judgment of Dismissal will therefore be granted as to Defendant Meyer Rosenbaum.

Done and Ordered at Detroit Michigan, this 18 day of April, 1974.

/s/ CORNELIA KENNEDY
United States District Judge

Dated: April 18, 1974

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## APPENDIX D

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR ORDER TO SET ASIDE AND VACATE ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINTS

On April 18, 1974 the Court denied plaintiff's motion to amend his complaint to include two more defendants. That decision was based on the applicable state and federal statutes of limitation. The instant motion, which the Court construes as a motion for reconsideration of that decision, was not filed within twenty days after entry of judgment, as required by local court Rule IX-A(1). Oral argument of the present action is not required under local Rule IX-A(3).



Since it appears that plaintiff has alleged no new facts which would prompt the Court to grant amendment of the complaint, nor stated any new reasons why the prior motion should be granted,

It Is Ordered that said motion be, and the hame hereby is, denied.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: August , 1975
Detroit, Michigan

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## APPENDIX E

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This Court, having been fully advised by Plaintiff, acting in propria persona and by Defendants' counsel in the oral Hearing on Defendants' Motion for Summary Judgment on Monday, August 11, 1975, and having considered the Briefs and materials filed by the parties hereto, including the Affidavits in support of Defendants' Motion for Summary Judgment, makes the following Findings of Fact and Conclusions of Law.

### Findings of Fact

1. This is an action for alleged copyright infringement of a musical composition entitled "Merry Christmas to You" for which Plaintiff contends he obtained United States Copyright Registration No. Eu 928,608;

2. The Defendant television stations were accused of broadcasting a ten second commercial of Defendant Meyer Jewelry Company from audio video tape which allegedly included approximately eight seconds of such music.

3. This Court previously found that plaintiff granted a license to Broadcast Music, Inc. (BMI) to perform by television broadcast, record and license others to record on tape for broadcast Plaintiff's allegedly copyrighted music and BMI licensed Defendant television stations. A Summary Judgment of Dismissal was therefore granted as to the Defendant television stations on April 18, 1974;

4. The remaining Defendants are accused of producing the audio-video tapes of the accused commercial, which tapes were used for the broadcasts by the Defendant television stations.

5. Prior to any alleged acts of infringement by Defendants of the Plaintiff's copyright, i.e., prior to the production of the accused audio-video tape and the broadcast of the commercial from such tape, Defendant Stone & Simons Advertising, Inc., contracted with each of the Defendant television stations to provide "telecasting facilities" for the broadcast of the accused Meyer Jewelry Company commercial from audio-video tape. Copies of these contracts are attached to the Affidavit of Charles G. Stone, as Exhibits 4, 5 and 6.

6. The unrefuted Affidavits submitted with Defendants' Motion establish that (a) the accused commercial was produced by Defendant Stone & Simons Advertising, Inc., on two-inch video quadraplex tape, which can only be viewed on the broadcast quadrature video tape recorders available at the Defendant television stations, and (b) the broadcast television tape was made by the Defendants solely for broadcast by the licensed television stations under the earlier telecasting contracts made between Stone & Simons and the television stations.



7. Each of the contracts between Defendant Stone & Simons Advertising, Inc., and Defendant television stations provide as follows:

> "9. Telecast Liabilities:
>
> (b) Indemnification by Station . . . Station will hold and save Agency and Advertiser harmless with respect to . . . the performance of musical compositions on Agency-produced telecasts provided the performances of such musical compositions are licensed for telecasting by a music licensing organization of which Station is a licensee."

8. Based upon the contract between Defendant Stone & Simons Advertising, Inc., and the Defendant television stations and the unrefuted Affidavits submitted with Defendants' Motion; (a) these contracts contemplated that Defendant Stone & Simons would supply the Defendant television stations with a special video quadraplex tape for broadcast by the television stations, this being a tape which is used only for broadcasting on television, (b) the television stations are licensed to broadcast copyrighted music by various "licensing organizations", including BMI, and the Defendants relied upon these licenses in producing the accused commercial, (c) the advertising agency (Defendant Stone & Simons Advertising, Inc.) and its sponsor (Defendant Meyer Jewelry Company) were beneficiaries of Plaintiff's BMI license as suppliers of the video quadraplex tape used for the accused broadcasts, to the same extent as if the television stations themselves produced such tape for broadcast.

9. The Affidavit of Charles G. Stone, President of Defendant Stone & Simons Advertising, Inc., and Morton Zieve, a partner in the advertising firm of Simons-Michelson Co., establish that the normal practice in the television advertising field in the production of television commercials is to rely upon the television stations' licenses to broadcast copyrighted music, which licenses are obtained from licensing organizations such as BMI. In this

case, since BMI did obtain from Plaintiff the license to broadcast and to make the tapes for broadcast of Plaintiff's alleged copyrighted music, and BMI in turn licensed the Defendant television broadcasters, both the licensed television broadcaster Defendants and the other Defendants who supplied the broadcasters with the tapes for the accused broadcasts, could and did properly rely upon such normal copyright licensing practice. Television broadcasting is almost entirely done by the use of pre-recorded tapes from which the actual broadcast eminates. Thus, a BMI license to broadcast copyrighted music necessarily includes the right to make and have made tapes for broadcast. Since the accused broadcasts were licensed by Plaintiff Jackson, through BMI, the tapes necessarily made for broadcasting were also licensed.

5. In view of the granting of Defendants' Motion for Summary Juddgment herein, Plaintiff's Motion for Summary Judgment of infringement is moot and therefore is denied.

Wherefore, it is hereby Ordered:

(1) That Defendants' Motion for Summary Judgment is granted;

(2) That Plaintiff's Motion for Summary Judgment is denied; and

(3) The Complaints herein are finally dismissed, with costs awarded to Defendants.

Done and Ordered at Detroit, Michigan, this 29th day of August, 1975.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: Aug. 29, 1975

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## APPENDIX F

### OPINION AND ORDER GRANTING ATTORNEY'S FEE AND COSTS TO DEFENDANTS

Pursuant to the Opinion and Order of this Court dated April 18, 1974 and the evidentiary Hearing of August 11, 1975, wherein Defendants presented the testimony of Alan P. Goldstein, this Court having found Mr. Goldstein an expert in law office economics and attorney's fees, and Raymond E. Scott, an attorney of record in the above entitled actions, this Court does hereby Order, Adjudge, and Decree, as follows:

The attorney's fees and costs actually incurred by Defendants in obtaining the License Agreement between Broadcast Music, Inc. and Plaintiff, and the necessary documents in the amount of One Thousand Forty-Five Dollars ($1,045.00) and Thirty Dollars and fifty-seven cents ($30.57), respectively, as specified in paragraph 4 of Mr. Scott's Affidavit of April 18, 1974, was reasonable and necessary to this litigation.

Plaintiff, Fleming S. Jackson, is hereby ordered to pay Defendants the sum of One Thousand Seventy-Five Dollars and fifty-seven cents ($1,075.57) and Defendants shall have execution thereof.

Done and Ordered at Detroit, Michigan, this 29th day of August, 1975.

/s/ Cornelia G. Kennedy
United States District Judge

Dated: Aug. 29, 1975.

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## APPENDIX G

### OPINION AND ORDER DENYING PLAINTIFF'S MOTIONS TO AMEND THE COMPLAINTS

This Court, having been fully advised by Plaintiff, acting in propria persona and by Defendants' counsel in the oral hearing on Plaintiff's Motions to Amend the Complaints and Vacate the previous Orders Denying Plaintiff's previous Motion to Amend the Complaints on August 11, 1975 and having considered the briefs and materials filed by the parties hereto, makes the following Findings of Fact and Conclusions of Law:

**Findings of Fact**

1. The proposed Amended Complaint submitted by Plaintiff with his Motion set forth the same alleged causes of action set forth in the Complaints filed in the the above identified Civil Actions Nos. 39,071 to 39,074 and 74-70900.

2. The proposed Amended Complaint also attempts to add a number of party Defendants which have not been named in the Complaints filed in Civil Actions Nos. 39,071 to 39,074 and 74-70900.

3. This Court has already found in its Order of April 18, 1974, that adding further Defendants as of *that* time is barred by the Statute of Limitations, i.e., the bringing of suit against those persons more than three years after the alleged tort was committed. That still applies now.

**Conclusions of Law**

1. The contractual relation between Plaintiff, Broadcast Music, Inc., the Defendant television stations and Defendants



Stone & Simons Advertising, Inc. is a complete bar to any action against the additional Defendants named in the proposed Amended Complaint;

2. Plaintiff, having failed to file a Motion to add parties Defendant, can not amend the Complaints in the above identified actions to include additional Defendants;

3. In view of the granting of Plaintiffs' Motion for Summary Judgment and the dismissal of the Complaints in Civil Actions Nos. 39,071 to 39,074 and Civil Action No. 7470900 except for the alleged conversion of Plaintiff's tape by Defendants Gary Rubin and Pioneer Recording Studios, Inc., the proposed Amended Complaint fails to state a cause of action and the isuue is moot.

Wherefore, it is hereby Ordered, that Plaintiff's Motions to Amend the Complaints are denied.

Done and Ordered at Detroit, Michigan this 29th day of August, 1975.

/s/ Cornelia G. Kennedy
United States District Judge

Dated: Aug. 29, 1975

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## APPENDIX H

### OPINION AND ORDER GRANTING DEFENDANTS STONE & SIMON'S AND MEYER JEWELRY'S MOTION FOR SUMMARY JUDGMENT

This Court, having been fully advised by Plaintiff, acting in propria persona and by Defendants' counsel in the oral Hearing on Defendants' Motion for Summary Judgment on

Monday, August 11, 1975, and having considered the Briefs and materials filed by the parties hereto, including the Affidavits in support of Defendants' Motion for Summary Judgment, makes the following Findings of Fact and Conclusions of Law.

**Findings of Fact**

1. This in an action for alleged copyright infringement and alleged conversion of Plaintiff's musical composition entitled "Merry Christmas to You" for which Plaintiff contends he obtained United States Copyright Registration No. Eu 928608.

2. This action was originally brought in the Circuit Court of the State of Michigan in and for the County of Wayne, Civil Action No. 73-258417 CZ, December 13, 1973.

3. Defendants removed this action to this Court and this Court denied Plaintiff's Motion to Remand February 19, 1974.

4. In denying Plaintiff's Motion to Remand, this Court found that the State Court Action was substantially identical to the four pending actions for copyright infringement, Civil Action Nos. 39071 and 39074, but adding a count for an alleged conversion of Plaintiff's music. The alleged conversion according to the Complaint took place more than three years before the filing of such Complaint. However, the Court reserves final ruling on such conversion count.

5. This Court therefore makes the same Findings of Fact made in the related actions, Civil Action Nos. 39071 to 39074.

**Conclusions of Law**

1. As to the alleged infringement of Plaintiff's copyright, this Court makes the same Conclusions of Law made in Civil Action Nos. 39071 to 39074.



2. As to the alleged conversion of Plaintiff's tape, this issue is held in abeyance and a separate opinion will be issued by this Court regarding this Count.

Wherefore, it is hereby Ordered that, except for the Count of alleged conversion, which applies only as to Defendants Gary Rubin and Pioneer Recording, Inc., the Complaint is dismissed as to all other Counts and all other Defendants, the Court hereby reserving ruling on such conversion Count.

Done and Ordered at Detroit, Michigan, this 29th day of August, 1975.

/s/ CORNELIA KENNEDY
United States District Judge

Dated: Aug. 29, 1975

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**APPENDIX I**

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This Court, having considered Defendants' Motion for Summary Judgment, including Defendants' Brief and Plaintiff's response, makes the following findings of fact and conclusions of laws:

**Findings of Fact**

1. This is an action for alleged copyright infringement and alleged conversion of a musical composition entitled "Merry Christmas to You" for which Plaintiff contends he obtained United States Copright Registration No. Eu 928608;

2. Upon Defendants' previous Motions for Summary Judgment, this Court found that Plaintiff's license to Broadcast Music Inc. was a bar to the copyright infringement counts and dismissed all of the Defendants and counts in this action, except for the alleged conversion of a recording of Plaintiff's music by Defendants' Gary Rubin and Pioneer Recording Studio, Inc.;

3. The alleged conversion by Defendants took place in November of 1970 (See Counts 2-8 of the Complaint), however, the Complaint in this action was not filed until December 14, 1973, more than three (3) years after the date of the alleged conversion;

4. Defendants in their Answer to the Complaint included affirmative defenses based upon the Michigan Statute of Limitations and Plaintiff, through his attorney of record who prepared the Complaint, characterized this action as "an action in common law tort for conversion" to which the three year Michigan Statute of Limitations is applicable;

5. For the purposes of Defendants' Motion only, the facts alleged by Plaintiff in his Complaint are presumed to be true, no proofs having been offered by Plaintiff or received in evidence.

**Conclusions of Law**

1. Counts 15-17 of the Complaint in this action allege that Defendants committed a tort of conversion by allegedly converting a recording of Plaintiff's music. The remaining counts allege copyright infringement, which have been previously dismissed;

2. The applicable Michigan Statute, MSA 600.5805 (7) provides a three (3) year period of limitations for actions to recover damages for conversion of personal property;



3. Counts 15-17 of the Complaint based uopn the alleged conversion are therefore barred by the Michigan Statute of Limitations;

Wherefore, it is hereby Ordered that Defendants' Motion for Summary Judgment is granted and the Complaint in this action is finally dismissed, with costs awarded to Defendants.

Done and Ordered at Detroit, Michigan, this 26th day of September, 1975.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: September 26, 1975.

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## APPENDIX J

### OPINION AND ORDER SETTING ATTORNEY'S FEES AND COSTS

In a previous order issued April 18, 1974, the Court granted defendant's Motion for Attorney's Fees and Costs incurred by the defendant television broadcasters in this case; defendants were ordered to submit an itemized statement of such fees and costs. An appropriate affidavit and itemized statement was received on May 1, 1974. The Court, sua sponte, ordered a hearing on the amount and reasonableness of the fees and costs claimed. This hearing, delayed by the appeal of another order in this case, was finally held on August 11, 1975. Plaintiff did not dispute the time or hourly rates or the costs incurred claimed, but rather argued generally that no award of fees and costs should ever have been granted.

Based on the affidavit of Raymond E. Scott; the hearing exhibit No. 1 (an itemization of fees charged); and the hearing testi-

mony of expert witness Allan Goldstein, an attorney; the Court finds that the attorney's fees and costs incurred by defendants in this case prior to April 15, 1974, amounted to $4,395.00, and that these fees and costs were reasonable.

The April 18, 1974 order stated that the attorneys' fees and costs of the defendant television broadcasters "be apportioned between the defendants on a numerical basis." While there were twelve named defendants in this action, it is clear from the record that certain of these defendants had identical interests. The costs of defending this action as to Meyer Jewelry Company and its president, Meyer Rosenbum, were, in the Court's opinion, no greater than the costs of defense as to either of these defendants had the other not been joined. Likewise, defendants The Evening News Association and WWJ-TV, the Detroit News, comprise but a single party in interest sofar as these fees and costs are concerned, as to WJBK-TV and Storer Broadcasting Company, and WXYZ-TV and WXYZ, Incorporated. (Defendant Gary Rubin, although president of defendant Pioneer Recording Studio, Inc., is also alleged to have had personal involvement in the alleged conversion of plaintiff's tape recording; his defense, therefore, involves issues distinct from those involved in defending Pioneer).

Thus, for purposes of apportioning costs, there were seven distinct interests in this action, although more named defendants, of whom these were television broadcasting stations. The amount of attorney's fees and costs granted by the Court's prior opinion is, therefore, determined to be 3/7 of $4,395.00,—or, $1,-883.57. Judgment Will Be Entered Accordingly.

It Is So Ordered.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: October 16, 1975
Detroit, Michigan

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## APPENDIX K

(Tr. p. 22) "* * * The Court: With regard to defendants' motion for Summary Judgment, it seems to me some distinction should be made with regard to the various defendants and although I am satisfied that the defendant television stations, in each instance, are entitled to the full benefit of the BMI contract, I am not fully satisfied that the other defendants are. I feel I need to do some research with regard to that question.

(Tr. p. 23) "The television stations, I believe, are entitled to the full benefit of the BMI contract. *They are parties to it indirectly and beneficiaries of it* and I think it clear that a contract is intended to cover even the situation here and the stations intended to protect themselves in all instances, in all suits for all kinds of performances; commercials, any other kind of performance and that the rights of the plaintiff in performance by the television stations, this particular music—strike particular, this music is protected by the BMI agreement. (Emphasis added.)

"Even though there is no provision for payment for this particular type of performance under that contract, I think the television stations and radio stations had the right to protect themselves against suit even where the particular commercial had not been authorized by the author or copyright owner as alieged here.

"I am, here today, not ready to rule on the other issues as to the other defendants and I intend to reserve my ruling on that and at this time—and I will give you a written opinion on the subject after I have completed the research I feel is necessary in this area."

"Mr. Scott: Thank you your Honor."

"Mr. Jackson: Your Honor, in regards—do I understand the television stations are being authorized to use plaintiff's copyrighted——"

(Tr. p. 24) "The Court. *No, I am saying they are protected by agreement whether authorized or unauthorized by you specifically in this instance.* * * *"

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## APPENDIX L

(Tr. pp. 31-32) "* * * The Court: I am just ruling on these, please.

With respect to a specific request—with respect to the request for attorney fees, the Court will not award attorney fees in connection with the removal of the State court case insofar as it relates to the defendant advertising company and that is because, in that particular case, Mr. Jackson had counsel, had an attorniey and the case was filed by an attorney and not by himself directly.

The Court will, however, award attorney fees to the attorneys for the respective—to the attorneys for the representation of the respective television stations in securing the information with regard to the BMI contract through the sources that were required because of the plaintiff's refusal to respond to the Requests for Documents. I will apportion the attorney fees and my understanding is—for all of the defendants and for the charges made in connection with the removal and the Answer in the case that was removed from the State court.

I will require counsel to submit a bill which separates the service made for services and apportion them. It's difficult to apportion them here and I will direct it be divided among the total number of defendants insofar as the removal case and total of cost in securing the BMI information from New York.

With regard to the motion to consolidate, the Court will consolidate Nos. 39071 through 39074 and will consolidate, for the



purposes of discovery, No. 74-70900. I will determine, later, the question of consolidating the removed case. *That action has a demand for a jury trial* and the question of consolidating a jury trial with a non-jury trial has to await the final pre-trial hearing when the issues have been narrowed.

The Court is also going to require, prior to the final pre-trial, that a single Amended Complaint be filed in Nos. 39071 through 39074 into one single Complaint. However, I will defer that until discovery is completed. * * *" (Emphasis added.)

(Tr. pp. 41-44) "The Court: Mr. Jackson, none of that relates to the matter of the defendants' decense that one, that the composition is not original and, two, that there is not enough of the composition to constitute infringement.

If you want to address yourself to those matters, you may. You can talk about prima facie—the copy is evidence of—it's an original, that's prima facie.

The defendants have the right to contradict that if they were able to do so.

Mr. Jackson: That matter was covered in my brief——

The Court: Secondly, whether there is a sufficient amount of the music on the tape to be distinguishable, *that's a factual question.* (Emphasis added)

Mr. Jackson: That was covered in my brief also.

The Court: I don't know, when you say it's covered in your brief, but your brief does not cover the question how you remove the factual issue on those matters.

If you want to tell me how, on the basis of the motion and the affidavits and the depositions the factual issues on those matters have been removed, I will be glad to hear from you. But, we have to get to the issues here.

The defendants have said they intend to show—both of things—these things and you can't decide that on a Motion for Summary Judgment. It may be on discovery when you have responded and discovery is completed on the issue, whether it's an original or not, at a later time, it may be an appropriate subject for a partial Motion for Summary Judgment, I don't know. But, it is not at this time.

Mr. Jackson: In a previous hearing, your Honor, I raised the point that the accused commercial was a joint work and that was not decided as a factual issue.

The Court: Well, whose joint work are you saying it is?

I am passing on the motions before me and your Motion for Summary Judgment is denied. That leaves, finally, the motion with regard to—I have to mark these down, there are so many of them.

That leaves, finally, the defendants' Motion for Summary Judgment as to Meyer Jewelry and Meyer Rosenbaum. The Court has, here, the question whether there is vicarious liability for copyright infringement.

The affidavit of Mr. Rosenbaum indicates that he was not consulted as to the music and that he did not know what music was actually used. There is, of course, considerable autority that a sponsor who exerts no control on program content is not liable for infringing material that's contained in the program. However, most of those cases were late programs and the substantive—concerned the substantive content of the program as opposed to the commercial portion of the program. Some of these cases, such as Davis v. E. I. DuPont de Nemours, 240 F. Supp. 612, Southern District of New York, 1965, the court has assumed, without particuar discussion, that the advertising agency is the alter ego of the sponsor of the agency in that case and the acts were deemed acts by the sponsor.

It seems to the Court that the critical question is *whether there is an issue of fact* on—in this case, as to whether Meyer Jewelry



had the right to control the commercial content if Meyer Jewelry chose to do so. It is not a case where the sponsor had no control or no right to control. (Emphasis added)

In Shapiro, Bernstein Co. v. H. L. Green Co., 316 F.2d 304, 2d Circuit, 1963, it was held that a chain store owner who had ultimate control over a concession which was an independent contractor, which concession was selling bootleg records and received a share of the concessions, profits, was liable for the copyright infringement.

*It seems to the Court, that under the affidavit here, that there is a factual issue* and the Court will deny the defendants' Motion for Summary Judgment as to Meyer Jewelry because of its—because there is a factual issue as to whether it had the right to exercise control of the commercial content. (Emphasis added)

However, the Court is of the opinion that there is no action stated against Mr. Meyer Rosenbaum individually. He did not, in his individual capacity, have that right and authority and there's no evidence that he, in fact, knew of the—nor as an individual, acted to cause the recording to be made or to have it played.

So, the Motion is denied as to Meyer Jewelry, Inc. and granted as to Mr. Meyer Rosenbaum individually. * * *"

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## APPENDIX M

(Tr. pp. 22-23) The Court: In determining whether the case which was filed in the Wayne County Circuit Court is an action, if it has any basis, that arises under the copyright laws or by reason of the copyright laws of the United States, the Court has to look at the *substance of the Complaint which was filed there rather than to its form*. (Emphasis added.)

"As I read the Plaintiff's Complaint in that action, although he speaks of conversion of tapes, he is really talking about the conversion of a musical idea and, indeed, in Paragraph 16, he talks about conversion of preproduction of the musical idea.

"Now, he has used the word conversion, but, I don't think that changes the substance of his Complaint which is that the defendants wrongfully used his musical idea. I don't think his Complaint, in the State Court, is limited to a single tape that someone converted and, indeed, his Complaint would then only be able to sound against Mr. Rubin because I don't think he claims that the other parties had physical possession of any property that belonged to the plaintiff; but only they used the musical idea that belonged to the Plaintiff, having copied something that physically belonged to him, or, at least, that's alleged.

"Looking at the substance of his Complaint and conceding, however—strike however, conceding even there could be conversion of an intangible in Michigan which I believe there could be, I do not believe there could be conversion of a musical idea which has been copyrighted and the only claim Plaintiff has is a claim under the copyright laws insofar as the copying of his music is concerned.

"Therefore, I will deny the motion for remand. * * *"

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## APPENDIX N

(Tr. pp. 2, 3, 4) "* * * The Court: With respect to the present motion for Summary Judgment, in reading the Complaint in this action, I am of the opinion that the conduct and acts alleged against the television stations despite the language of the allegations, as to performances, *I consider them to be within the copyright statute and copyright laws of the United*



*States.* I don't think by calling them something else they become anything else. (Emphasis added.)

"As I previously ruled, I think that the contract here with BMI which in turn licensed the television stations, each of the broadchasting stations included here, *constitutes a complete bar for any action against those stations* and I will grant and do grant Summary Judgment to the radio stations in this action. (Emphasis added.)

"In the previous actions, I had not yet ruled on the question whether the contract protected and completely barred any action against the advertising agency, as against Mr. Rubin, as against the sponsor. None of these persons, as far as the record presently shows, none of them had any direct contractual relationship with BMI.

"The problem is quite a difficult one because in order for there to be copyright infringement, there has to be unauthorized public performances for profit.

"In view of the relationship between BMI and the radio stations or the television stations, in my belief as far as the television stations were concerned, the performance was not unauthorized. It is somewhat difficult to see how it could be unauthorized that—strike that, authorized as to the television stations and unauthorized insofar as the ad agency, insofar as the sponsor of Mr. Rubin is concerned.

"However, with respect to the particular case that is before me this morning on the motion for Summary Judgment which makes allegations of conversion, the Court would have to and does deny the motion insofar as Mr. Rubin is concerned because I think there are allegations of conversion by him. The same would apply to Pioneer Recording Studio, Inc. in which Mr. Rubin is the president—is alleged to be the president.

"The balance of the allegations of the Complaint in No. 74-70900 action was ruled on. The State court action, in the

Court's opinion, relates to copyright allegations although couched in different language and are no different from the four Complaints filed previously in the Federal Court.

"If the defendant advertising agency and defendant sponsor had received, through authorization from—permission or consent through the television stations or had had some contractual relationship with the television stations to make them beneficiaries of the BMI contract or if said defendants showed some custom or usage in that regard, then the Court might believe that that contract was for their benefit and they were protected by it.

"However, the present affidavits do not indicate that and there would be, at least, a copyright violation in the copying of the tapes for such production whether the damages are significant or not.

"So, with respect to both this action and the other actions, the Court will deny the motion for Summary Judgment as against Stone and Simon Inc., as to Gary Rubin, Pioneer Recording and Meyer Jewelry. * * *"

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## APPENDIX O

In the United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson,<br>Plaintiff,<br>vs.<br>Stone & Simons Advertising, Inc., et al.,<br>Defendants. | Civil Action Nos.<br>39071, 39072, 39073,<br>39074, and 74-70900<br>Judge Cornelia Kennedy |

### NOTICE OF APPEAL

(Filed September 24, 1976)

Notice Is Hereby Given that Fleming S. Jackson, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the "Order Denying Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments" entered in the above actions on the 31st day of August, 1975.

FLEMING S. JACKSON
Pro Se
5061 Dailey
Detroit, Michigan 48204
(313) 894-3789

Dated: September 20, 1976

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## APPENDIX P

(Tr. p. 2) Mr. Scott: "* * * Defendants' motion for Summary Judgment will dispose of the four lawsuits and defendants ask that the discovery motions which are the other three motions to be held in abeyance. There are no issues of fact in the defendants' motion because it is based solely on a contract which speaks for itself.

(Tr. p. 18) "* * * therefore, the only evidence before the Court is that the particular music composition which is the musical composition Mr. Jackson claimed we copied, was licensed by that contract. We have no other evidence * * *."

(Tr. p. 4) "* * * there is no issue of fact here because of the fact the contract speaks for itself. The contract itself proves that plaintiff had no standing to sue because he sold the performance rights to BMI and, two, he sold his rights to bring suit. * * *"

(Tr. pp. 19-20) "* * * The contract decides—requires no parol evidence. It is clear on its face and it is licensed to do exactly what we're doing.

Furthermore, we think, most importantly, what BMI gave to the television stations, whether they released it, we have ignored these questions for this one reason because if the Court agrees with our position that Mr. Jackson licensed BMI to do what we're accused of doing, whether or not my clients were licensees is irrelevant because under paragraph 13, he granted to BMI the exclusive right to bring this action. If there is any infringement here which we deny, if there is anything that we have done here which is wrong, then, it is BMI's sole and exclusive right to bring this action.

"* * * This is not a copyright case, your Honor, this is a contract case. There should be no parol evidence to be admitted other than was the contract executed, was it executed



and was it in force. The copyright law is completely irrelevant. * * *"

(Tr. pp. 14-17) "The Court: I want to be certain what we're talking about here.

'Do I understand Mr. Jackson's position and it is really his position because we have to assume the facts most favorable to him on this motion for summary judgment——

"Mr. Scott: Yes, Your Honor.

"The Court: Do I understand, Mr. Jackson, that it is your claim that the background music results from a copying of a specific recording or performance? I want to get our facts here.

"Mr. Scott: As I understand it——

"The Court: Let me ask him.

"Mr. Jackson: Yes, Your Honor.

"It is a section of Merry Christmas To You, Exhibit Q in the cases there. It is an exact recording, a reproduction of section—Exhibit 2——

"The Court: That's not my question.

"Is it your claim that some recording was made of your composition and that the defendants copied that specific and particular recording, recorded it on a specific tape or is it your claim that they recorded your music, some one of the defendant or some person without your authorization, recorded the music which is actually on the commercial? In other words, I just want to know because it's kind of confusing here, what you claim the source of the particular sound we heard that day?

"Mr. Jackson: The particular sound came directly from plaintiff's work, produced by plaintiff——

"The Court: And a production you caused to be produced; is that your claim?

"Mr. Jackson: Yes, Your Honor.

"The Court: What date do you claim it was recorded on?

"Mr. Jackson: October 14, 1966—'67—I am getting my dates mixed up.

"October 14, 1966.

"The Court: Do I understand, on October 14, 1966, it is your claim that you had a recording made of your composition for the purpose of distribution or whatever——

"Mr. Jackson: It wasn't for the purpose of distribution on October the 14. That came later on in the next month, November.

"The Court: What was your purpose in recording on October 14, 1966?

"Mr. Jackson: The purpose of the recording was to get the work completed—get the work into a completed form so someone else might hear it, perhaps hear it and perhaps use it.

"We completed the master tape, but, we didn't create a commercial recording on that particular day.

"The Court: Just so I understand it, it's your claim that the music on that master tape was recorded October 14, 1966 and a portion of that is what is used in the background music in the commercial?

"Mr. Jackson: Yes, Your Honor.

"The Court: I want to get the time straight.

"Mr. Scott: Assume the actual tape and the record by defendant Tru-Soul——

"The Court: Copied, you mean?

"Mr. Scott: Copied.

"The Court: The recording, I will call the first master tape. Anything else would be a copy.



"Mr. Scott: Specifically, took that recording and made a copy. Assume that to be true, assuming that copy is used in the television broadcast or advertising, Your Honor, we say, assuming all those facts, the fact is that Mr. Jackson gave to BMI a contract to do exactly what the defendants did."

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## APPENDIX Q

In the United States District Court for the
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson,<br>Plaintiff,<br>vs.<br>Stone & Simon Advertising, Inc., et al.<br>Defendants. | Civil Action Nos.<br>39071, 39072,<br>39073, 39074;<br>and 74-70900 |

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed April ~~23~~ 25, 1975 7)

Notice is hereby given that Fleming S. Jackson, the Plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order denying "Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments" entered in Civil Action Nos. 39071, 39072, 39073, 39074; and removed Civil Action No. 74-70900 on August 31, 1976.

This appeal is taken pursuant to 28 U.S.C. §§ 1252, 2101.

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5067 Dailey
Detroit, Michigan 48204
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**APPENDIX R**

MOTION FOR SUMMARY JUDGMENT AND AWARD OF ATTORNEY'S FEES

Defendants move for Summary Judgment Dismissal of the Complaints and for an award of reasonable attorney's fees, based upon the grounds that:

1. Plaintiff has no standing to sue because he does not own the rights to the copyrighted work-in-suit (i.e., he assigned the rights to BMI before the alleged infringement).

2. Plaintiff has no standing to sue because he assigned his right of legal action and recovery to BMI.

3. Defendants alleged infringing television broadcasts were *licensed* by Plaintiff's assignee BMI.

4. Defendants are entitled to an award of reasonable attorney's fees and costs based upon (a) Plaintiff having brought suit contrary to and in disregard of his own contractural agreements, (b) Plaintiff's contractural obligation to indemnify BMI's licensees and (c) Plaintiff's concealment of his assignment of his rights to BMI.



A copy of Plaintiff's contract with BMI, and a Brief and Affidavit in support of his Motion are attached.

Respectfully submitted,

CULLEN, SETTLE, SLOMAN & CANTOR, P.C.
By BERNARD J. CANTOR
By RAYMOND E. SCOTT
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400
Attorneys for Defendants

Dated: 8/7/73

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**APPENDIX S**

COMPLAINT

Now comes plaintiff Fleming S. Jackson, In Pro Per, and says:

1. That this cause arises under the United States Copyright Laws, 17 USC, § 101 thereof, and that this Court has jurisdiction of this cause pursuant to 28 USC § 1338 (a).

2. That prior to March 11, 1966, plaintiff Fleming S. Jackson, who then was and ever since has been, a citizen of the United States and a resident of the State of Michigan, created and wrote an original musical composition entitled, "Merry Christmas to You". A copy of plaintiff's copyrighted work is annexed hereto as Exhibit "A".

3. Tha said musical composition contains material wholly original with the plaintiff and is copyrightable subject matter under the copyright laws of the United States.

4. That the plaintiff has complied with the Act of July 30, 1947, and all other laws governing copyrights and secured the exclusive rights and privileges in and to the copyright of the musical composition entitled, "Merry Christmas to You", and received from the Register of Copyrights a Certificate of Registration, dated and identified as follows: March 11, 1966, Class E, No. Eu 928608. A copy of plaintiff's Certificate of Registration received from the Register of Copyrights is annexed hereto as Exhibit "B".

5. That on or about November 14, 1966, plaintiff filed in the Copyright Office a Form U, "Notice of Use of Copyrighted Music on Mechanical Instruments", as required by Section 1 (e) of Title 17, USC, covering said musical composition, and received from the Register of Copyrights an Acknowledgment of Receipt of a Notice of Use of Copyrighted Music on Mechanical Instruments, which is recorded in Notice of Use records in Volume 80, Page 144. A copy of plaintiff's Acknowledgment of Receipt of a Notice of Use of Copyrighted Music on Mechanical Instruments received from the Register of Copyrights is annexed hereto as Exhibit "C".

6. Since registration plaintiff has been and now is the sole owner and proprietor of all rights, title and interest in and to the copyright of said musical composition.

7. That defendant Gary Rubin is a citizen of the United States and a resident of the State of Michigan.

8. That prior to the acts of infringement complained of herein, the defendants, their agents, servants and employees had access to the plaintiff's copyrighted work.

9. That the acts of infringement complained of herein were committed within the State of Michigan, County of Wayne.

10. That on or about October 3, 1966, the plaintiff hired Robert M. Durant to write two arrangements of said musical



composition for thirteen (13) instruments and plaintiff paid Robert M. Durant Three Hundred Five Dollars ($305.00) for writing said arrangements. A copy of plaintiff's cancelled checks and a receipt from Robert M. Durant is annexed hereto as Exhibit "D" and a copy of plaintiff's Vocal Arrangement is annexed hereto as Exhibit "E". A copy of plaintiff's Instrumental Arrangement is annexed hereto as Exhibit "F".

11. That on or about October 1, 1966, plaintiff signed a contract hiring thirteen musicians of the Detroit Federation of Musicians, Local No. 5, to record said copyrighted arrangements of said musical composition. A copy of plaintiff's contract is annexed hereto as Exhibit "G".

12. That said recording session was held on October 14, 1966, at United Sound Systems Recording Laboratory located at 5140 Second Boulevard, Detroit, Michigan 48202.

13. That on October 14, 1966, a four track one half (½) inch "master tape" (15 i p s) of plaintiff's said copyrighted arrangements of said musical composition was produced by plaintiff at said recording session. A copy of Recording Log Sheet for Job No. 10988 is attached hereto as Exhibit "H".

14. A copy of plaintiff's four (4) track one-half (½) inch "master tape" is not attached hereto because it is heavy, bulky and cumbersome; said copy will be made available as requested by this Honorable Court.

15. That on or about October 14, 1966, a completed one track one-fourth inch "master tape" with a tape speed of fifteen inches per second was produced from plaintiff's said four track one-half inch "master tape" with a tape speed of fifteen inches per second. A copy of plaintiff's one track one-fourth inch "master tape" is annexed hereto as Exhibit "I".

16. That said musicians at said recording session were paid union scale, as required by the Detroit Federation of Musicians

Local No. 5, totaling One Thousand Fifty Dollars ($1050.00). A copy of plaintiff's receipt is annexed hereto as Exhibit "J".

17. That plaintiff paid all costs for the rental of the recording studio at United Sound Systems Recording Laboratory for the recording of said musical composition and all costs for "master tapes", "mixing" of "master tapes" and all costs for "demo" recordings of said musical composition. A copy of plaintiff's receipts is annexed hereto as Exhibit "K". A copy of plaintiff's "demo" recording is annexed hereto as Exhibit "L".

18. That on or about October 13, 1966, plaintiff signed a contract hiring singer Bill Murphy to record the words of said musical composition. A copy of plaintiff's contract is annexed hereto as Exhibit "M".

19. That plaintiff paid singer Bill Murphy One Hundred Fifty Dollars ($150.00) for said performance. A copy of plaintiff's receipt is annexed hereto as Exhibit "N".

20. That at all times hereinafter mentioned, defendant Pioneer Recording Studio, Inc., a Michigan corporation, was a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, and having its place of business at 20014 James Couzens Highway, Detroit, Michigan 48221.

21. That on or about October 31, 1966, plaintiff entered into a "Record Promotion Agreement" with Pioneer Recording Studio, Inc., for the promotion of said musical composition. A copy of plaintiff's "Record Promotion Agreement" is annexed hereto as Exhibit "O".

22. That said "Record Promotion Agreement" commenced on the 31st day of October, 1966, and terminated on the 28th day of February, 1967. (See Exhibit "O").

23. That defendant Pioneer Recording Studio, Inc., agreed to be plaintiff's exclusive promoter of said musical composition for the said four (4) month period. (See Exhibit "O").



24. That on or about October 31, 1966, plaintiff's one track one-fourth inch completed "master tape" with a tape speed of fifteen inches per second, of said copyrighted arrangements of said musical composition was left by plaintiff in the custody of defendant Gary Rubin, President of defendant Pioneer Recording Studio, Inc.

25. That plaintiff's said one fourth inch (¼) one track completed "master tape" (15 i p s) was in the custody of defendant Pioneer Recording Studio, Inc., for several days.

26. That defendant Pioneer Recording Studio, Inc., ordered the making of "master plates" TK4M-9638 and TK4M-9639 from plaintiff's one track one fourth (¼) inch "master tape" of said copyrighted arrangements of said musical composition and defendant Pioneer Recording Studio, Inc., ordered the pressing of one thousand (1000) 45 r.p.m. commercial records of said musical composition from said "master plates" by Radio Corporation of America selection number 811-P-2103 as agreed in said "Record Promotion Agreement." A copy of job order is annexed hereto as Exhibit "P". A copy of 45 r.p.m. commercial record of said musical composition selection number 811-P-2103 is annexed hereto as Exhibit "Q".

27. That the plaintiff paid One Hundred Fifty Dollars ($150.00), the total cost of the pressing and delivering of said one thousand (1000) 45 r.p.m. commercial records of plaintiff's production of said copyrighted arrangements of said musical composition. A copy of plaintiff's receipt is annexed hereto as Exhibit "R".

28. That on or about October 31, 1966, defendant Gary Rubin, President of defendant Pioneer Recording Studio, Inc., read and examined plaintiff's copy of Certificate of Registration of a Claim to Copyright as received from the Register of Copyrights, dated and identified as follows: March 11, 1966, Class E, No. Eu 928608.

29. That defendant Pioneer Recording Studio, Inc., agreed to extend the use of the record label of Pioneer Recording Studio, Inc., to the plaintiff during the term of said "Record Promotion Agreement". (See Exhibit "O")

30. That on or about February 2, 1967, the plaintiff received an accounting from defendant Pioneer Recording Studio, Inc., of all the business transactions that occurred during the period of said "Record Promotion Agreement" between plaintiff and defendant Pioneer Recording Studio, Inc., a copy of which financial statement is annexed hereto as Exhibit "S".

31. That since February 28, 1967, the plaintiff has not had any contracts or agreements whatsoever with defendants Pioneer Recording Studio, Inc., and Gary Rubin relative to said musical composition.

32. That at all times hereinafter mentioned defendant Stone & Simon Advertising, Inc., a Michigan corporation, was a corporation duly organized and existing under and by virtue of the laws of the State of Michigan and having its place of business at 15301 West Eight Mile Road, Detroit, Michigan 48235.

33. That at all times hereinafter mentioned defendant Meyer Jewelry Company, a Michigan corporation, was a corporation duly organized and existing under and by virtue of the laws of the State of Michigan and having its principal place of business at 1400 Woodward Avenue, Detroit, Michigan 48226.

34. That defendant Meyer Rosenbaum, President of Meyer Jewelry Company, is a citizen of the United States and a resident of the State of Michigan.

35. That the residency and citizenship of defendant John Doe, the announcer who took part in the production of said infringing commercial, is not known at this time.



36. That at all times hereinafter mentioned, defendant WXYZ-TV, Channel 7, a Michigan corporation, was a corporation duly organized and existing under and by virtue of the laws of the State of Michigan and having its headquarters at 20777 W. Ten Mile Road, Southfield, Michigan 48075.

37. That during or about November, 1970, Stone & Simons Advertising, Inc., Meyer Jewelry Company and Meyer Rosenbaum, without license or consent of plaintiff and for profit, procured the making of tape transcriptions by Pioneer Recording Studio, Inc., of a commercial message for Meyer Jewelry Company that contained, as background music, a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition. A copy of the infringing commercial is annexed hereto as Exhibit "T".

**Count II**

38. That plaintiff Fleming S. Jackson incorporates by reference as though fully set forth herein, Paragraphs 1 through 37 of Count I.

39. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Meyer Jewelry Company, Meyer Rosenbaum, Pioneer Recording Studio, Inc., Gary Rubin and John Doe the announcer, without license or consent of plaintiff, and for profit, copied a substantial portion of material from plaintiff's production of said copyrighted arrangement of said musical composition for use as background music in a commercial message for Meyer Jewelry Company. (See Exhibits "I", "T" and "Q")

40. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Meyer Jewelry Company, Meyer

Rosenbaum, Pioneer Recording Studio, Inc., Gary Rubin and John Doe the announcer, without license or consent of plaintiff and for profit, produced a tape of a commercial message for Meyer Jewelry Company that contained a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition as background music. (See Exhibits "I", "Q" and "T")

41. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin, Meyer Jewelry Company, Meyer Rosenbaum and John Doe, the announcer, without license or consent of plaintiff and for profit, reproduced tapes of a commercial message for Meyer Jewelry Company that contained, as background music, a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition. (See Exhibits "I", "T" and "Q")

42. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin, Meyer Jewelry Company, Meyer Rosenbaum and John Doe, the announcer, without license or consent of plaintiff and for profit, manufactured tape transcriptions of a commercial message for Meyer Jewelry Company that contained a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition as background music. (See Exhibits "I", "T" and "Q")

43. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin, Meyer Jewelry Company, Meyer Rosenbaum and John Doe, the announcer, without license or consent of plaintiff and for profit, adapted a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition by synchronizing said material



with a commercial message for Meyer Jewelry Company as background music. (See Exhibits "I", "T" and "Q")

44. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin, Meyer Jewelry Company, Meyer Rosenbaum and John Doe, the announcer, without license or consent of plaintiff and for profit, used a substantial part of plaintiff's arrangement of said copyrighted arrangement appropriated from plaintiff's production of said musical composition in a commercial message for Meyer Jewelry Company as background music. (See Exhibits "I", "T" and "Q")

**Count III**

45. That plaintiff Fleming S. Jackson incorporates by reference as though fully set forth herein Paragraphs 1 through 37 of Count I and Paragraphs 38 through 44 of Count II.

46. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin and John Doe, the announcer, without license or consent of plaintiff and for profit, represented plaintiff's exclusive rights and privileges in and to the copyright of said musical composition. A copy of a letter from defendant Pioneer Recording Studio, Inc., to WWJ-TV, The Detroit News, is annexed hereto as Exhibit "U". A copy of a letter from defendant Pioneer Recording Studio, Inc., to plaintiff is annexed hereto as Exhibit "V".

47. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin and John Doe, the announcer, without license or consent of plaintiff and for profit, extended the use of a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composi-

tion to Meyer Jewelry Company for use as background music in a commercial message for Meyer Jewelry Company. (See Exhibits "I", "T", "Q", "U" and "V")

48. That during or about November, 1970, defendants Stone & Simon Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin and John Doe, the announcer, without license or consent of plaintiff and for profit, sold tapes of a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition in a commercial message for Meyer Jewelry Company as background music. (See Exhibits "I", "Q", "T", "U" and "V")

**Count IV**

49. That plaintiff Fleming S. Jackson incorporates by reference as though fully set forth herein, Paragraphs 1 through 37 of Count I, Paragraphs 38 through 44 of Count II and Paragraphs 45 through 48 of Count III.

50. That several times during or about November, 1970, until about December 18, 1970, the defendants have made "unfair use" of plaintiff's production of said copyrighted arrangement of said musical composition.

51. That during or about November, 1970, Stone & Simon Advertising, Inc., WXYZ-TV, Channel 7, WXYZ-Inc., Pioneer Recording Studio, Inc., Meyer Jewelry Company, Meyer Rosenbaum, Gary Rubin and John Doe, the announcer, without license or consent of plaintiff and for profit, authorized the broadcasting of a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition in a commercial message for Meyer Jewelry Company as background music. A copy of a letter from defendant Pioneer Recording Studio, Inc., to plaintiff's former attorney is annexed hereto as Exhibit "W". A copy of a letter from defendant



WXYZ-TV, Channel 7 to plaintiff's former attorney is annexed hereto as Exhibit "X". (See Exhibits "I", "Q", "T", "U" and "V")

52. That during or about November, 1970, until about December 18, 1970, WXYZ-TV, Channel 7, Stone & Simon Advertising, Inc., WXYZ-Inc., Meyer Jewelry Company, Meyer Rosenbaum, Pioneer Recording Studio, Inc., Gary Rubin and John Doe, the announcer, without license or consent of plaintiff and for profit, broadcasted several times each day a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition in a commercial message for Meyer Jewelry Company as background music. (See Exhibits "I", "Q", "T", "U", "V", "W" and "X")

53. That said broadcasts of said material from said musical composition originated from WXYZ-TV, Channel 7, which is owned by WXYZ-Inc.

54. That on December 16, 1970, defendant WXYZ-TV, Channel 7, was notified by certified mail regarding said infringing Meyer Jewelry Company commercial that contained a substantial portion of material appropriated from plaintiff's production of said copyrighted arrangement of said musical composition. A copy of a letter from plaintiff's former attorney to defendant WXYZ-TV, Channel 7, is annexed hereto as Exhibit "Y". A certified copy of the Post Office's record of the delivery of certified letter No. 233649 is annexed hereto as Exhibit "Z-3". A copy of the return receipt to plaintiff from the Post Office for certified letter No. 233649 is annexed hereto as Exhibit "Z-4". (See Exhibit "X")

55. That on December 14, 1970, defendant Meyer Jewelry Company was notified by registered mail regarding said infringing Meyer Jewelry Company commercial on WXYZ-TV, Channel 7 that contained a substantial portion of material ap-

propriated from plaintiff's production of said copyrighted arrangement of said musical composition. A copy of a letter from plaintiff to Meyer Rosenbaum, President of Meyer Jewelry Company, is annexed hereto as Exhibit "Z". A copy of the Post Office's record of the delivery of registered letter No. 371678 is annexed hereto as Exhibit "Z-1". (See Exhibit "V")

56. That the defendants continued to infringe plaintiff's copyright to said musical composition several times a day from during or about November, 1970 until on or about December 18, 1970. A tape of some of the broadcasts of said infringing commercial originating from WXYZ-TV, Channel 7, is annexed hereto as Exhibit "Z-2". (See Exhibits "I", "T" and "Q")

57. That defendants have made large profits by reason of the infringement of plaintiff's copyrighted work.

Wherefore, plaintiff demands:

1. That defendants' agents, servants, employees, salesmen, distributors, successors and assigns and all of those under authority of or in privity with them or any of them be forthwith enjoined and restrained during the pendency of this action, and permanently, from infringing said copyright in any manner.

2. That defendants be adjudged to have infringed Copyright Registration No. 928608, and that defendants be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of the copyright, and to account and pay over to plaintiff all the gains, profits and advantages derived by defendants from their infringement of plaintiff's copyright, or such damages as to the Court shall appear proper within the provisions of the copyright statute but not less than Two Hundred Fifty Dollars ($250.00) per infringement.

3. That such damages and profits sustained by plaintiff be trebled.



4. That defendants be required to deliver up to be impounded during the pendency of this action all copies in their possession or under their control infringing said copyright, and to deliver up for destruction all infringing copies and all tapes, plates, molds and other matter for making such infringing copies.

5. That the defendants pay to the plaintiff the cost of this action and that reasonable attorneys' fees be allowed to plaintiff by the Court.

6. That plaintiff have such other relief as may be just and proper.

FLEMING S. JACKSON
In Pro Per
5061 Dailey
Detroit, Michigan 48204
894-3789

Dated: October 19, 1972

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## APPENDIX T

### ANSWER

Defendants, Stone & Simon Advertising, Inc., Meyer Jewelry Company, Meyer Rosenbaum, WXYZ-Inc. and WXYZ-TV, Channel 7, hereby Answer to the Complaint as follows.

1. Denied.

2. Being without sufficient information to either admit or deny the allegation of Paragraph 2, Defendants deny same, leaving Plaintiff to his proofs.

3. Denied.

4-5. Being without sufficient information to either admit or deny the allegations of Paragraphs 4 and 5, Defendants deny same, leaving Plaintiff to his proofs.

6. Denied.

7. Admitted.

8-9. Denied.

10-31. Being without sufficient information to either admit or deny the allegations of Paragraphs 10-31, inclusive, Defendants deny same, leaving Plaintiff to his proofs.

32. Admitted.

33. Admitted.

34. Admitted.

35. Being without sufficient information to either admit or deny the allegation of Paragraph 35, Defendants deny same, leaving Plaintiff to his proofs.

36. Denied.

37. Denied.

38. Same answers as given above in Answers to Paragraphs 1-37, inclusive.

39. Denied; no exhibits I, T and Q were included with the service of the Complaint herein, and thus, Defendants object to the failure of service of copy thereof.

40-44. Denied.

45. Same answers as given above in response to Paragraphs 1 through 44.

46-48. Denied.

49. Same answers as given above in response to Paragraphs 1 through 48, inclusive.

50-57. Denied.



Affirmative Defenses

58. The Complaint herein fails to state a cause of action against the Defendants identified above as answering thereto, and this Court lacks jurisdiction.

59. The accused commercial does not include music copyrighted by Plaintiff and thus, Defendants have not infringed any copyright of Plaintiff's.

60. The accused commercial does not include music original with or copyrightable to Plaintiff, but rather music which is in the public domain and thus, there is no infringement of any rights of Plaintiff.

61. Plaintiff's copyright registration is void and invalid and unenforceable for lack of originality of subject matter and lack of compliance with the applicable sections of the copyright statute.

62. The music included in the accused commercial was properly licensed and/or included with proper permission for the purpose for which it was used and thus, there is no infringement by Defendants.

63. The accused commercial was so short, i.e., roughly eight seconds and the advertising message thereon was so prominent relative to the background music, that said background music even if it were the alleged copyrighted music, which Defendants deny, was so obscured, and in any event was so promptly changed upon objection received from Plaintiff, and there having been no damage caused to or loss incurred by Plaintiff and no profits to Defendants attributable to such music, that the claim of infringement made herein and damages caused thereby are de minimis.

Wherefore, Defendants request:

1. That the Complaint herein be dismissed with prejudice, with costs and reasonable attorney's fees awarded to Defendants.

2. That Defendant be enjoined from further asserting infringement against Defendants or those in privity with them on account of the alleged infringement set forth in the Complaint herein.

3. That the Plaintiff's alleged copyright be declared invalid and not infringed by Defendants.

4. That this Court grant such other and further relief as it may deem just and proper.

CULLEN, SETTLE, SLOMAN
& CANTOR
By BERNARD J. CANTOR
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400
Attorneys for Defendants

Dated: Nov. 30, 1972

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## APPENDIX U

State of Michigan
In the Circuit Court for the County of Wayne

| | |
|---|---|
| Fleming S. Jackson,<br>Plaintiff,<br>v.<br><br>Stone and Simons Advertising, Inc., a Michigan Corporation; Meyer Jewelry Company, a Michigan Corporation; Meyer Rosenbaum, President of Meyer Jewelry Company; WWJ-TV, The Detroit News, a Michigan Corporation; Storer Broadcasting Company; WJBK-TV, a Michigan Corporation, WXYZ Inc., a Michigan Corporation, WXYZ-TV, a Michigan Corporation, Pioneer Recording Studio, Inc., a Michigan Corporation; Gary Rubin, President, Pioneer Recording Studio, Inc.; The Evening News Association, a Michigan Corporation, Jointly and Severally,<br>Defendants. | Civil Action<br>No. 73-258417 CZ |

### COMPLAINT

Now Comes Fleming S. Jackson, the Plaintiff, by and through his attorney, Paul D. Muller, and by way of complaint against the Defendants, Jointly and Severally, says that which follows:

**Jurisdictional Averments**

1. That the Plaintiff, Fleming S. Jackson, is a resident of the City of Detroit, County of Wayne, and State of Michigan.

2. That the Defendant, Stone and Simons Advertising, Inc. is a corporation licensed by the State of Michigan. Its principal place of business is 19900 W. Nine Mile Rd., Southfield, Oakland County, Michigan. Said corporation actively carries on its business in Wayne County, Michigan.

3. That the Defendant, Meyer Jewelry Company, is a corporation licensed by the State of Michigan. Its principal place of business is 1400 Woodward Ave., Detroit, Wayne County, Michigan and said corporation carries on its business in Wayne County, Michigan.

4. That the Defendant, Meyer Rosenbaum, is the President of Meyer Jewelry Company, and said Meyer Rosenbaum maintains an office at 1400 Woodward Ave., Detroit, Wayne County, Michigan, and he carries on business at that address.

5. That the Defendant, WWJ-TV, The Detroit News, is a corporation licensed by the State of Michigan. Its principal place of business is 615 W. Lafayette, Detroit, Wayne County, Michigan and said corporation carries on its business in Wayne County, Michigan.

6. That the Defendant, Storer Broadcasting Company, is a foreign corporation, which owns and operates WJBK-TV, a corporation licensed by the State of Michigan. That said foreign corporation maintains an office at 2 Storer Place, Southfield, Oakland County, Michigan and carries on business within Wayne County, Michigan.

7. That the Defendant, WJBK-TV, is a corporation licensed by the State of Michigan. Its principal place of business is 2 Storer Place, Southfield, Oakland County, Michigan, and



said corporation carries on business within Wayne County, Michigan.

8. That the Defendant, WXYZ-TV, is a corporation licensed by the State of Michigan. Its principal place of business is 20777 W. Ten Mile Road, Southfield, Oakland County, Michigan, and said corporation carries on business within Wayne County, Michigan.

9. That the Defendant, WXYZ Inc., is a corporation licensed by the State of Michigan which corporation owns and operates WXYZ-TV. WXYZ Inc's. principal place of business is 20777 W. Ten Mile Road, Southfield, Oakland County, Michigan, and said corporation carries on business within Wayne County, Michigan.

10. That the Defendant, Pioneer Recording Studio, Inc., is a corporation licensed by the State of Michigan. Its principal place of business is 20014 James Couzens Highway, Detroit, Wayne County, Michigan and said corporation carries on business within Wayne County, Michigan.

11. That the Defendant, Gary Rubin, is the President of Pioneer Recording Studio, Inc., and said Gary Rubin maintains an office at 20014 James Couzens Highway, Detroit, Wayne County, Michigan and he carries on business at that address.

12. That the Defendant, The Evening News Association, is a corporation licensed by the State of Michigan. Its principal place of business is 615 W. Lafayette, Detroit, Wayne County, Michigan, and said corporation carries on its business in Wayne County, Michigan.

13. That all causes of action arising herein occurred within the past three years and took place within both Wayne and Oakland Counties.

**Factual Allegations**

1. That Paragraphs 1-13 under Jurisdictional Averments are hereby incorporated by reference thereto and made an express part hereof.

2. That prior to March 11, 1966, the Plaintiff, Fleming S. Jackson, created and wrote an original musical composition entitled, "Merry Christmas To You," a copyrighted work.

3. That said musical composition contains material wholly original with the Plaintiff and is copyrightable subject matter under the copyright laws of the United States.

4. That the Plaintiff has complied with the Act of July 30, 1947, and all other laws governing copyrights and secured the exclusive rights and privileges in and to the copyrights and secured the exclusive rights and privileges in and to the copyright of the musical composition entitled, "Merry Christmas To You," and received from the Register of Copyrights a Certificate of Registration, dated and identified as follows: March 11, 1966, Class E, No. Eu 928608.

5. That on or about November 14, 1966, Plaintiff filed in the Copyright office a Form U, "Notice of Use of Copyrighted Music on Mechanical Instruments," as required by Section 1 (e) of Title 17, USC, covering said musical composition, and received from the Register of Copyrights an Acknowledgment of Receipt of a Notice of Use of Copyrighted Music on Mechanical Instruments, which is recorded in Notice of Use records in Volume 80, page 111.

6. Since registration, Plaintiff has been and now is the sole owner and proprietor of all rights, title and interest in and to the copyright of said musical composition and the use thereof.

7. That prior to the wrongful and tortious acts and conduct complained of herein, the Defendants, their agents, servants and employees had access to the Plaintiff's copyrighted work.



8. That on or about October 3, 1966, the Plaintiff hired Robert M. Durant to write two arrangements of said musical composition for thirteen (13) instruments and Plaintiff paid Robert M. Durant ($305.00) for writing said arrangements.

9. That on October 14, 1966, a four track, one half (½) inch "master tape" (15 i p s') of Plaintiff's said copyrighted arrangements of said musical composition was produced by Plaintiff at a recording session.

10. That on or about October 14, 1966, a completed one track, one-fourth inch "master tape" with a tape speed of fifteen inches per second was produced from Plaintiff's said four track, one-half inch "master tape" with a tape speed of 15 inches per second.

11. That said musicians at said recording session were paid in total the sum of One Thousand Fifty Dollars ($1,050.00.)

12. That Plaintiff paid all costs for the rental of the recording studio at United Sound Systems Recording Laboratory for the recording of said musical composition and all costs for "master tapes," "mixing" of "master tapes" and all costs for "demo" recordings of said musical composition.

13. That Plaintiff pursuant to contract paid singer Bill Murphy $150 to record the words of said musical composition.

14. That on or about October 31, 1966, the Plaintiff entered into a "Record Promotion Agreement" with Pioneer Recording Studio, Inc., for the promotion of said musical composition; said "Record Promotion Agreement" commenced on October 31, 1966, and terminated on February 28, 1967.

15. That Defendant, Pioneer Recording Studio, Inc., agreed to be Plaintiff's exclusive promoter of said musical composition solely for said four (4) month period.

16. That on or about October 31, 1966, the Plaintiff's one track, one-fourth inch completed "master tape," with a tape speed of fifteen inches per second, of said copyrighted arrangements of said musical composition was left by Plaintiff in the care and custody of Defendant, Gary Rubin, President of Defendant, Pioneeer Recording Studio, Inc. Said one fourth inch (¼), one track completed "master tape" was in the care and custody of Defendant, Pioneer Recording Studio, Inc., for several days.

17. That Defendant, Pioneer Recording Studio, Inc., ordered the making of "master plates" TK4M-9638 and TK4M-9639 from the Plaintiff's one track, one fourth (¼) inch, "master tape" of said copyrighted arrangements of said musical composition and Defendant, Pioneer Recording Studio, Inc., ordered the pressing of one thousand (1,000) 45 r.p.m. commercial records of said musical composition from said "master plates" by Radio Corporation of America selection number 811P-2103 as agreed in said "Record Promotion Agreement."

18. That the Plaintiff paid One Hundred Fifty Dollars ($150.00), the total cost of the pressing and delivering of said one thousand (1,000) 45 r.p.m. commercial records of Plaintiff's production of said copyrighted arrangements of said musical composition.

19. That on or about October 31, 1966, Defendant, Gary Rubin, President of Defendant, Pioneer Recording Studio, Inc. read and examined Plaintiff's copy of Certificate of Registration of a Claim to Copyright as received from the Register of Copyrights, dated and identified as follows: March 11, 1966, Class E, No. Eu 928608.

20. That Defendant, Pioneer Recording Studio, Inc. agreed to extend the use of the record label of Pioneer Recording Studio, Inc. to the Plaintiff during the term of said "Record Promotion Agreement."



21. That on or about February 2, 1967 the Plaintiff received an accounting from Defendant, Pioneer Recording Studio, Inc., of all the business transactions that occurred during the period of said "Record Promotion Agreement" between the Plaintiff and the Defendant, Pioneer Recording Studio, Inc.

22. That since February 28, 1967, the Plaintiff has not had any contracts or agreements whatsoever with the Defendants, Pioneer Recording Studio, Inc., and Gary Rubin or any other named defendant relative to said musical composition or its use.

**Count I**

1. That Paragraphs 1-13 under Jurisdictional Averments and Paragraphs 1-22 under Factual Allegations are hereby incorporated by reference thereto and made an express part hereof.

2. During or about November, 1970, Defendants Stone and Simons Advertising Inc., Meyer Jewelry Company, Meyer Rosenbaum, Pioneer Recording Studio, Inc., and Gary Rubin without license or consent express or implied of the Plaintiff and for profit, copied a substantial portion of material from Plaintiff's production of said copyrighted arrangement of said musical composition which was later used as background music in a commercial message for Meyer Jewelry Company.

3. That during or about November, 1970, Defendants Stone and Simons Advertising, Inc., Meyer Jewelry Company, Meyer Rosenbaum, Pioneer Recording Studio, Inc., and Gary Rubin without license or consent express or implied of the Plaintiff and for profit, produced a tape, reproduced tapes, and manufactured tape transcriptions of a commercial message for Meyer Jewelry Company which message contained as background music substantial portion of material appropriated from Plain-

tiff's production of said copyrighted arrangement of said musical composition.

4. That during or about November, 1970, Defendants Stone and Simons Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin, Meyer Jewelry Company, Meyer Rosenbaum, without license or consent express or implied of the Plaintiff and for profit, adapted a substantial portion of material appropriated from the Plaintiff's production of said copyrighted arrangement of said musical composition by synchronizing said material with a commercial message for Meyer Jewelry Company as background music.

5. That during or about November, 1970, Defendants Stone and Simons Advertising, Inc., Pioneer Recording Studio, Inc., Gary Rubin, Meyer Jewelry Company, Meyer Rosenbaum without license or the consent express or implied of the Plaintiff and for profit, used a substantial part of the Plaintiff's arrangement of said copyrighted arrangement which had been appropriated from Plaintiff's production of said musical composition in a commercial message for Meyer Jewelry Company as background music.

6. That during or about November, 1970, the Defendants Stone and Simons Advertising, Inc., Pioneer Recording Studio, Inc., and Gary Rubin without license, authority, or consent express or implied of the Plaintiff and for profit, held themselves out to possess and have authorization to convey to others what was, in fact, the Plaintiff's exclusive rights and privileges in and to the copyright of said musical composition and its use.

7. That during or about November, 1970, Defendants Stone and Simons Advertising, Inc., Pioneer Recording Studio, Inc., and Gary Rubin, without license, authority, or the consent express or implied of the Plaintiff and for Profit, intentionally extended the use of a substantial portion of a material appropriated from the Plaintiff's production of said copyrighted ar-



rangement of said musical composition to Meyer Jewelry Company for use as background music in a commercial message for Meyer Jewelry Company.

8. That during or about November, 1970, Defendants Stone and Simons Advertising, Inc., Pioneer Recording Studio, Inc., and Gary Rubin, without license, authority, or the consent express or implied of the Plaintiff and for a profit, sold tapes of a substantial portion of material appropriated totally without authority from Plaintiff's production of said copyrighted arrangement of said musical composition in a commercial message for Meyer Jewelry Company as background music.

9. That on several occasions during or about November, 1970, until about December 25, 1970, all of the eleven (11) Defendants made commercial and unauthorized use for profit of Plaintiff's production of said copyrighted arrangement of said musical composition.

10. That during or about November, 1970, and continuing thereafter all of the eleven (11) named Defendants including WWJ-TV, The Detroit News; WXYZ-TV, WJBK-TV, without license, authority, or the consent expressed or implied of the Plaintiff and for profit, authorized and caused the broadcasting of a substantial portion of material appropriated wrongfully from the Plaintiff's production of said copyrighted arrangement of said musical composition in a commercial message for Meyer Jewelry Company as background music. Said broadcasting occurred several times on each date in question without any prior knowledge on the part of the Plaintiff.

11. That on or about December 16, 1970, Defendant WWJ-TV, Channel 4, was notified by certified mail that said Meyer Jewelry Company commercial message infringed upon the copyright of the Plaintiff. Said broadcasts did continue after receipt of the Plaintiff's letter, nonetheless.

12. That on December 14, 1970, Defendant Meyer Jewelry Company was notified by registered mail that its commercial message which had been broadcast infringed upon the copyright and privileges of the Plaintiff. Said broadcasts did continue after receipt of the Plaintiff's letter, nonetheless.

13. That all eleven (11) Defendants continued to infringe Plaintiff's copyright and right to profits from said musical composition several times a day from during or about November, 1970, until on or about December 25, 1970.

14. That all eleven (11) Defendants named herein have made large profits by reason of the infringement of Plaintiff's copyrighted work.

15. That the Defendants Pioneer Recording Studio, Inc., and Gary Rubin did knowingly and intentionally, with scienter, convert the above mentioned master tape and/or some other form of reproduction of the Plaintiff's copyrighted production for their own use and profit.

16. That all eleven (11) named Defendants are liable for conversion either by knowingly and intentionally and/or unintentionally converting some tangible reproduction of the Plaintiff's copyrighted musical production to their own use for profit.

17. That the Defendants Pioneer Recording Studio, Inc., and Gary Rubin did fraudulently conceal the fact that they had no authority to sell, dispose of, or in any way deliver up a master tape and/or other tangible form of reproduction of the Plaintiff's copyrighted work mentioned above.

Wherefore, the Plaintiff prays that this Honorable Court will grant him the following equitable and legal relief:

a) Judgment of damages against all eleven (11) named Defendants, Jointly and Severally, herein in the amount of not more than $150,000.



b) In addition to that amount of damages requested in paragraph (a) above, the Plaintiff prays that this Honorable Court award him punitive damages against all eleven (11) Defendants, Jointly and Severally, in the amount of $300,000.

c) The Plaintiff prays that this Honorable Court award the Plaintiff costs, interest and attorneys fees.

d) That all eleven (11) named Defendants be forever enjoined and restrained from the further misuse of Plaintiff's copyrighted musical composition and all rights and privileges arising therefrom.

FLEMING S. JACKSON
Plaintiff

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## APPENDIX V

### JURY DEMAND

Now Comes the above named Plaintiff, Fleming S. Jackson, by and through his attorney, Paul D. Muller, and hereby demands a trial by jury of the above entitled cause of action.
Dated:

PAUL D. MULLER
Attorney for Plaintiff
13700 Woodward Ave.—Suite 400
Highland Park, Michigan 48203
869-3320

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## APPENDIX W

In the United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson,<br>Plaintiff,<br>vs.<br>Stone & Simon Advertising, Inc., et al.,<br>Defendants. | Civil Action<br>No. 74-70900<br>Judge Cornelia Kennedy |

In answer to the Complaint filed in the Circuit Court for the County of Wayne of the State of Michigan and identified as Civil Action No. 72-258417CZ, which Complaint has been removed to this Court pursuant to Petition for Removal, Defendants hereby answer to said Complaint as follows:

Jurisdictional Averments:

1. Being without sufficient information to either admit or deny the allegation of Paragraph 1, Defendants deny same, leaving Plaintiff to his proofs.

2. Admitted, except that Defendants, Stone & Simons Advertising Agency, actively carries on its business in Oakland County, Michigan.

3. Admitted.

4. Admitted.

5. Denied.

6. Denied.



7. Denied.

8. Denied.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Denied.

14. As their affirmative defense with respect to the question of jurisdiction, Defendants aver first, that the Circuit Court for the County of Wayne of the State of Michigan is without jurisdiction since jurisdiction over copyright actions lie wholly within the Federal District Courts in accordance with the Copyright Statutes of the United States and second, action herein is barred under both the Federal statute of limitations as applied to copyright suits and also under the statute of limitations of the State of Michigan.

Factual Allegations:

1. See answers Nos. 1-14 given above under Jurisdictional Averments Section.

2. Denied.

3. Denied.

4. Denied.

5. Being without sufficient information to either admit or deny the allegation of Paragraph No. 5, Defendants deny same, leaving Plaintiff to his proofs.

6. Denied

7. Denied.

8.-13. Being without sufficient information to either admit or deny the allegations set forth in Paragraphs 8-13 inclusive, Defendants deny same, leaving Plaintiff to his proofs.

14. Admitted, except the date of termination is denied.

15. Admitted, except for the word "solely".

16. Denied.

17. Admitted, except that the statement "said copyrighted arrangements of said musical composition" is denied.

18. Being without sufficient information to either admit or deny the allegation of Paragraph No. 18, Defendants deny same, leaving Plaintiff to his proofs.

19. Denied.

20. Admitted.

21. Admitted.

22. Denied.

Count I:

1. Same answer as given above in paragraphs Nos. 1-14 under Jurisdictional Averments and Paragraph Nos. 1-22 under Factual Allegations.

2. Denied.

3. Denied.

4. Denied.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

9. Denied.



10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

**Affirmative Defenses**

1. The Circuit Court for the County of Wayne of the State of Michigan lacks jurisdiction of the cause of action complained of herein, with such cause of action being solely within the jurisdiction of the Federal District Courts pursuant to the Copyright Statutes of the United States.

2. The Complaint herein is barred by the Federal statute of limitations as applicable to copyrights and also by the Michigan State statute of limitations.

3. The broadcasts and/or performances and other acts complained of herein were all licensed by Plaintiff by virtue of Plaintiff's having licensed Broadcast Music, Inc., which in turn licensed the defendant broadcasters to perform such music and to make such tapes as are required for such broadcasting, wherefore Defendants herein have not infringed any copyrights of Plaintiff.

4. Plaintiff has no standing to bring suit herein having assigned an irrevocable power of attorney to Broadcast Music, Inc., to bring suit and/or enforce the copyright set forth in the Complaint, wherefore, Plaintiff has no right to bring suit on his own behalf.

5. The Complaint herein is moot in that Plaintiff has contractually obligated himself by virtue of his license agreement with BMI (Broadcast Music, Inc.) to save harmless and indemnify BMI's licensees, namely the Defendants herein, wherefore, any awarded damages as a result of the Complaint herein and/or any expenses and/or costs or the like incurred herein must be repaid by Plaintiff to Defendants pursuant to Plaintiff's contractual obligation. Hence, should Plaintiff be awarded judgment herein, *Plaintiff* would be contractually required to pay the judgment himself.

6. The accused commercial does not include music copyrighted by Plaintiff and thus, Defendants have not infringed any copyright of Plaintiff; in addition, the accused music does not include music original with or copyrightable to Plaintiff, but rather music which is in the public domain and thus there is no infringement of any rights of Plaintiff.

7. Plaintiff's copyright registration is void and invalid and unenforceable for lack of originality of subject matter and lack of compliance with the applicable sections of the Copyright Statutes.

8. The music included in the accused commercial was of such short duration and so indistinguishable and unintelligible to the average listener that even if it were the alleged copyrighted music, which Defendants deny, there is no infringement and in any event no losses or damages incurred by Plaintiff and no profits of Defendants attributable to such music so that the claim of infringement made herein and the damages alleged to have been caused thereby are de minimus.

9. Plaintiff is barred by laches against maintaining this cause of action having unreasonably and unconscionably delayed in registering any complaints with respect to such commercial, despite knowledge that the commercial was a Christmas Season performance and thus of only short duration, so that Plaintiff's



delay in claiming copyright infringement, which claim was immediately responded to by changing the background music of such commercial, amounts to laches.

10. The bringing of this suit in State Court subsequent to the oral ruling of the Federal District Court to the effect that the broadcaster defendants herein were properly licensed and thus not liable for infringement of any copyright of Plaintiff, is an abuse of process and brought for harassment purposes rather than for legitimate purposes and have been and is causing considerable damages to Defendants, particularly by way of extensive attorneys' fees incurred and other expenses incurred in the defense of this suit.

Wherefore Defendants request:

1. That the Complaint herein be dismissed with prejudice and that all costs and reasonable attorneys' fees incurred in connection with the defense herein shall be awarded to Defendants.

2. That Plaintiff be enjoined from further asserting infringement and/or other causes of action relating to its alleged copyrighted music against Defendants or those in privity with them.

3. That Plaintiff's alleged copyright be declared invalid and not infringed by Defendants.

4. That this Court order Plaintiff to pay to Defendants all expenses incurred in connection with this action by virtue, inter alia, of Plaintiff's contract with Broadcast Music, Inc. of which Defendants are a beneficiary.

5. That this Court grant such other and further relief as it may deem just and proper.

**Counterclaim**

For their counterclaim, Defendants herein state as follows:

1. Defendants herein are a number of broadcasters, each licensed by Broadcast Music, Inc., to perform music previously licensed by Plaintiff to Broadcast Music, Inc. (BMI), and also an advertiser, an advertising agency and a sound studio all of whom are accused by Plaintiff of copyright infringement based upon the allegation that such Defendants have performed in a commercial certain music allegedly copyrighted by Plaintiff. Plaintiff has licensed Broadcast Music, Inc., under his contended copyright the right to grant broadcasters the right to perform all or any part of his music on television and to prepare tapes for such broadcast purposes, and including granting to BMI the exclusive rights for enforcement of and for bringing infringement actions relating to said copyright and irrevocably appointing BMI as his attorney for such legal action and furthermore promising to indemnify BMI licensees for any damages, losses or liabilities incurred in connection with performances of Plaintiff's music, wherefore Plaintiff has knowledge that he is not entitled to bring this suit nor entitled to collect any damages as a result of such suit.

2. The United States District Court for the Eastern District of Michigan in four copending suits brought against the same Defendants as are named herein, orally found at the Hearing on a Motion for Summary Judgment on November 19, 1973 that the broadcaster Defendants herein were properly licensed by Plaintiff through their license agreements with BMI to perform the acts accused of herein and thus were not liable to Plaintiff, but despite such ruling from the bench, Plaintiff has instigated the present suit whereby the bringing of this suit is an abuse of process and an improper harassment of Defendants herein, as well as a violation of his agreement with BMI, to which agreement Defendants are beneficiaries, causing expenses to Defendants in Defense thereof.

Whereupon Defendants herein under their counterclaim request:



1. That this Court order Plaintiff to pay to Defendants all expenses incurred by Defendants due to this litigation, including an award of exemplary damages for harassment and abuse of process and breach of contract.

2. That this Court preliminarily and permanently enjoin Plaintiff from ever again instigating any further lawsuits against Defendants herein relating to his alleged copyrighted music and/or copyright.

3. That this Court grant Summary Judgment dismissal of the Complaint herein on the same grounds set forth in the four co-pending suits.

Respectfully,

CULLEN, SETTLE, SLOMAN &
CANTOR, P.C.
By BERNARD J. CANTOR
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400
Attorneys for Defendants

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## APPENDIX X

### PLAINTIFF'S MOTION FOR JURY DEMAND

Now Comes the Above Named Plaintiff, Fleming S. Jackson, In Pro Se, and hereby demands a trial by jury of the above entitled cause of action, pursuant to Rules 38(a) and 39 FRCP, 28 USCA, and USCA Constitutional Amendment 7.

1. The above action is brought by Plaintiff to recover damages only for alleged statutory infringement of copyright.

2. The Complaints in the above action allege actual damages.

3. The above action is brought by Plaintiff to recover treble damages and actual damages.

4. There being no issue of fact regarding this motion, the Plaintiff respectfully submits that an oral hearing is not necessary and that a decision on this motion may be made without an oral hearing.

5. A Brief in support of this motion is attached hereto.

Respectfully submitted,

FLEMING S. JACKSON
In Pro Se
5061 Dailey
Detroit, Michigan 48204
(313) 894-3789

Dated: November 1, 1974

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## APPENDIX Y

### DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S DEMAND FOR JURY TRIAL

Defendants ask this Court to deny Plaintiff's Motion for Jury Trial because of Plaintiff's failure to comply with Rule 38(b) FRCP.

These four suits for copyright infringement were filed two years ago, in October of 1972. The Answers were filed in November and December of 1972. Each of the Complaints included a demand for damages and treble damages. Therefore, the Plaintiff's demand for a jury trial on damages and treble damages is untimely.



Rule 38(b) FRCP states that a demand for jury trial must be made "not later than ten days after the service of the last pleading directed to" the issue to be tried. Rule 38(d) FRCP states that "failure of a party to serve a demand as required by this rule . . . constitutes a waiver by him of trial by jury." Therefore Plaintiff has waived trial by jury and Plaintiff's Motion must be denied.

Defendants agree with Plaintiff's statement that oral hearing is unnecessary and join Plaintiff in requesting decision without oral hearing.

Respectfully submitted,

CULLEN, SETTLE, SLOMAN & CANTOR, P.C.
By: RAYMOND E. SCOTT
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400

Dated: November 15, 1974

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## APPENDIX Z

### DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JURY TRIAL

(Dated May 15, 1975)

Defendants ask this Court to deny Plaintiff's Motion for Jury Trial of May 11, 1975, because of Plaintiff's failure to comply with Rule 38(b) F.R.C.P.

These four suits for copyright infringement were filed in October of 1972; Answers were filed in November and December

of 1972. The Complaints demand injunctive relief and/or accounting. Therefore, if Plaintiff is entitled to a jury trial on what appears to be an equitable claim, Plaintiff's demand for jury trial is untimely.

Rule 38(b) F.R.C.P. states that a demand for jury trial must be made "not later than ten days after the service of the last pleading directed to" the issue to be tried. Rule 38(d) F.R.C.P. states that "failure of a party to serve a demand as required by this rule constitutes a waiver by him of trial by jury". Therefore, Plaintiff has waived trial by jury and Plaintiff's Motion must be denied.

Respectfully submitted,

CULLEN, SETTLE, SLOMAN &
CANTOR, P. C.
By BERNARD J. CANTOR
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400

Dated: May 14, 1975.

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## APPENDIX AA

### PLAINTIFF'S MOTION FOR JURY TRIAL

(Dated April 25, 1975)

Now Comes the Above Named Plaintiff, Fleming S. Jackson, *pro se*, and hereby requests a trial by jury of the above entitled causes of action pursuant to Rules 38(a) and 39(b) FRCP, 28 USCA, and USCA Constitutional Amendment 7.



1. The above action is brought by Plaintiff to recover damages only for alleged statutory infringement of copyright.

2. A trial by jury is conferred by statute to all parties to such action.

3. Plaintiff has not waived and does not waive his right to a jury trial of causes of action alleged in the Complaints of the above entitled action.

4. The Complaints in the above entitled action allege actual damages and treble damages.

5. All parties to said action are entitled to a jury trial of Plaintiff's claim for such alleged damages.

6. Plaintiff alleges that the claims in said Complaints for such alleged damages are "legal issues" in an action at "law" in contradistinction to "equitable issues."

7. Plaintiff alleges that all parties to the above entitled action are entitled to a jury trial of such "legal issues," in said Complaints, as of right.

8. A brief in support of this Motion is attached hereto.

Respectfully submitted,

By FLEMING S. JACKSON
Pro Se
5061 Dailey
Detroit, Michigan 48204
(313) 894-3789

Dated: April 25, 1975

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## APPENDIX BB

### STIPULATION OF UNCONTESTED FACTS

(Dated June 9, 1975)

Plaintiff, Fleming S. Jackson, and Defendants, through their counsel of record, hereby stipulate to the following uncontested facts in regard to the above litigation:

1. A commercial of Meyer Jewelry Company was broadcast by the Defendant TV stations from video tape; said commercial including a video portion and background recorded music;

2. The above referenced commercial of Meyer Jewelry Company was produced by Defendant Stone & Simons Advertising, Inc.; and

3. The video tape of the above referenced commercial of Meyer Jewelry Company was produced at WKBD TV for Stone & Simons Advertising, Inc.

The above uncontested facts were agreed to by the parties in a conference on June 4, 1975.

FLEMING S. JACKSON

Dated: 6-9-75

BERNARD J. CANTOR
CULLEN, SETTLE, SLOMAN & CANTOR, P. C.
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400
Attorneys for Defendants

Dated: 6/9/75

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## APPENDIX CC

**Page 19 of Transcript, June 19, 1975**

"* * * Mr. Jackson: Your Honor, I don't know what issues will be tried——

The Court: *The issues that will be tried are the issues raised by the pleadings.* The question is whether the music they played is the music copyrighted which they have not admitted. I have to try that issue. (Emphasis added.)

Then, we have—let's assume that I find that it's the music you copyrighted that they played, then, we have the issue of whether they had any right to play it which they claim they had. We will try to—those issues and then the question whether there is injury or damage, what music was played and what the injury and damage is.

Mr. Jackson: I see.

The Court: There may be others. * * *"

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## APPENDIX DD

### SUMMARY OF PLAINTIFF'S THEORY OF THE CASE

**Introduction**

1. The accused commercial is a "new work" that is based on a portion of Plaintiff's copyrighted musical composition entitled "Merry Christmas To You."

2. The background music in the accused commercial is a portion of Plaintiff's copyrighted musical composition entitled "Merry Christmas To You."

3. Plaintiff's "original" version of his said work is the "underlying work" of his arrangement of said work done for hire by Robert M. Durant.

4. Said arrangement of said work has "new matter" added.

5. Said arrangement is a "new work" that is the "underlying work" of the accused commercial.

6. Said arrangement is a "distinguishable variation" of the "original" version of Plaintiff's said work.

7. The accused commerical is a "distinguishable variation" of said arrangement of said work done "for hire" by Robert M. Durant.

8. The accused commercial is a "new work" that *is not* copyrighted.

9. The accused commercial does not have a title.

10. The title of the accused commercial *is not* "Merry Christmas To You."

11. The accused commercial is not licensed by BMI.

12. The Complaints in this action allege statutory infringement of Plaintiff's copyright to said work by Defendants.

13. This Court has ruled that Defendants copied a portion of Plaintiff's "master tape" of Plaintiff's production of said work.

14. This Court has ruled that such copying of such tape is a "copyright violation."

15. Defendants, in essence, admit infringement of Plaintiff's said work.

16. Plaintiff claims actual damages of $1,580.00.

17. There was infringement.



**Detailed Statement**

I

This is an action for statutory infringement of copyright resulting from the alleged broadcast of a ten (10) second commercial by Defendant TV stations. The accused commercial was produced, reproduced and broadcast on videotape, including a video representation and a recorded audio portion. The audio portion of the commercial included an announcer advertising the products of Defendant Meyer Jewelry Company and approximately eight (8) seconds of background music, which is the same time span as the commercial message given by the announcer. Plaintiff alleges that the background music infringes his United States Copyright to this work entitled "Merry Christmas To You."

Since registration Plaintiff has been and now is the sole owner and proprietor of all rights, title and interest in and to the copyright of said musical composition. Furthermore, Plaintiff's original Certificate of Registration received from the Register of Copyrights is filed in the record as docket number 83.

Defendants admit that a portion of Plaintiff's said work was produced, reproduced and broadcast on videotape in a commercial on television for Meyer Jewelry Company for profit without Plaintiff's consent. Defendants claim that license for such use of Plaintiff's said work was obtained from BMI.

II

Plaintiff will show as follows:

1. That BMI licenses only copyrighted works that are listed on the BMI repertoire known as "Schedule A."

2. That the accused commercial is a "new work" that has not been copyrighted.

3. That the accused commercial does not have a title.

4. That the title of the accused commercial is not "Merry Christmas To You."

5. That the words spoken by the announcer in the accused commercial were not written by Plaintiff.

6. That the words spoken by the announcer in the accused commercial are in the public domain.

7. That a "new work" was created when Defendants combined the message spoken by the announcer in the accused commercial with a portion of Plaintiff's said work.

8. That Defendant television stations have not been dismissed from this action.

9. That a copyright is a creature of statute.

10. Customs of the trade in the advertising field in relation to the use of copyrighted works is immaterial.

11. That Defendants employed a portion of Plaintiff's said work in the accused commercial without license or consent of Plaintiff and for profit.

III

The accused commercial is a work that is substantially based on Plaintiff's said work. All of the background music employed in the accused commercial is a portion of Plaintiff's said work. Therefore, fifty percent (50%) of the material that comprises the accused commercial is a portion of Plaintiff's said work.



A new work was created when the Defendants combined a portion of Plaintiff's said work with the commercial message spoken by the announcer in the accused commercial.

It is infringement to use copyrighted material in such a work for profit without license or consent of the copyright owner and proprietor.

There was infringement of Plaintiff's copyright to said work and such infringement *was not* de minimus.

FLEMING S. JACKSON
Pro Se
5061 Dailey
Detroit, Michigan 48204
(313) 894-3789

Dated: June 12, 1975

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**APPENDIX EE**

SUMMARY OF DEFENDANTS' THEORY OF THE CASE

**Introduction**

Defendants contend that the Complaint for copyright infringement should be dismissed because:

1. Defendants were licensed by Plaintiff to broadcast Plaintiff's music.

2. There was no infringement.

3. *If* there was infringement, it was de minimus.

4. Plaintiff has no valid copyright on the musical background used in the accused commercial.

5. Plaintiff has not been damaged by any acts of Defendants.

**Detailed Statement**

This is an action for copyright infringement resulting from the alleged broadcast of a ten (10) second commercial by Defendant TV stations. The accused commercial was produced on video tape, including a video representation and a recorded audio-portion. The audio-portion of the commercial included an announcer advertising the products of Defendants Meyer Jewelry Company and approximately eight (8) seconds of background music. Plaintiff alleges that the background music infringes his United States Copyright.

This Court has found that the television stations were licensed to broadcast Plaintiff's music under a license agreement between Plaintiff and Broadcast Music, Inc., (BMI) and dismissed the television station Defendants. The video tape which was broadcast by the television stations was produced at WKBD-TV a licensed broadcaster. Defendants will show that it is the custom of the trade in the advertising field to rely upon the BMI Licenses of the television broadcasters in preparing commercials for television broadcast. Further, Defendant Stone & Simons Advertising, Inc. specializes in preparing commercials for radio and television and the video tape used in the accused commercial could only be viewed or broadcast from the television stations. Therefore Defendants reasonably relied upon the licenses of the television broadcasters and prepared the commercial solely and exclusively for broadcast by the licensed television broadcasters.



Further, as a separate defense of non-infringement, Defendants will show that an ordinary viewer-listener of the accused commercial would not have recognized the music as Plaintiffs'. Also, Defendants contend that the musical background used in the accused commercial was not copyrighted by Plaintiff

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CANTOR, P.C.
By BERNARD J. CANTOR
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(313) 964-0400
Attorney for Defendants

Dated: 6/9/75

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**APPENDIX FF**

PRE-TRIAL STATEMENT OF DEFENDANTS

Pursuant to the Standing Order of the Court regarding Final Pre-Trial Conferences in non-jury cases dated April 14, 1975, the Defendants respond as follow:

1. A conference was held between Plaintiff, Mr. Fleming S. Jackson and Defendants' attorney, Raymond E. Scott, June 4, 1975 regarding a stipulation of all uncontested facts. Attached is the parties stipulation in conformance with Paragraph 1 of the Standing Order.

2. Attached is a summary of Defendants' theory of the case.

3. Defendants intend to offer the following exhibits at the Trial:

(a) An audio and visual reproduction of the accused television commercial.

(b) The contract of Plaintiff with BMI attached to Defendants' Motion for Summary Judgment.

(c) The script for the accused Meyer Jewelry Company commercial attached as Exhibit 3 to the Deposition of Alan Luckoff.

(d) The Stone & Simons Advertising, Inc. invoice No. 4570 to Meyer Jewelry Company attached as Exhibit 4 to the Deposition of Alan Luckoff.

(e) License Agreement Renewal dated September 29, 1975 attached as Exhibit 12 to the Deposition of Franklin Sisson.

(f) License Agreement Renewal dated February 8, 1975 attached as Exhibit 13 in the Deposition of Franklin Sisson.

(g) License Agreement Renewal dated February 8, 1965 attached as Exhibit 14 in the Deposition of Franklin Sisson.

(h) Single Station License Agreement Renewal attached as Exhibit 15 in the Deposition of Franklin Sisson; and

(i) Single Station License Agreement dated December 18, 1964 attached as Exhibit 16 of the Deposition of Franklin Sisson.

(j) Contracts with TV Stations, Exhibits 5, 7 and 9 Luckoff Deposition.

4. Defendants have requested attorney's fees and costs for the defense of this litigation and Defendants have filed a Statutory Offer of Judgment. No other special damages are claimed.

5. Defendants intend to call the following witnesses at the Trial:

(A) Gary Rubin, President of Pioneer Recording Company, a Defendant in this action.

(B) Alan Luckoff, Vice President of Defendant Stone & Simons Advertising, Inc. Defendants' attorney has just



learned that Alan Luckoff has been hospitalized because of a serious illness. Other officers or employees of Defendant Stone & Simons Advertising, Inc. may therefore be called if Mr. Luckoff is not available at the time of Trial, or his deposition may be offered in lieu thereof.

(C) Professor Robert Lawson, Chairman of the Music Department of Wayne State University.

(D) Franklin Sisson, Station Manager of WWJ-TV.

(E) Mr. Robert W. Jones, Instructor of Music Theory & History at Schoolcraft College.

CULLEN, SETTLE, SLOMAN
& CARTER, P.C.
By BERNARD J. CANTOR
3200 Penobscot Building
Detroit, Michigan 48226
(313) 964-0400
Attorneys for Defendant

Dated: 6/9/75

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## APPENDIX GG

### PLAINTIFF'S OBJECTIONS TO TRIAL EXHIBITS

I

Now comes Plaintiff Fleming S. Jackson, pro se, and files his objections to the following proposed trial exhibits listed in Pre-Trial Statement of Defendants entered on the 9th day of June, 1975, under paragraph 3 items (a), (b), (e), (f), (g), (h), and (i) (copy attached.)

II. Videotapes of the Accused Commercial

1. Plaintiff must object to the proposed videotape exhibit of the accused commercial on the grounds that Defendants' Counsel, Mr. Raymond Scott, has stated at least four times on the record that such tape does not exist.

2. Mr. Scott has emphatically argued that such tapes were destroyed immediately following the broadcast of the accused commercial.

3. Such statement was made by said Defendants' counsel on page 3 of *Defendants' Answer to Plaintiff's Requests for Admissions.*

4. The production charges for the manufacture of the videotape of the accused commercial, attached to invoice No. 12-1129, which was produced by Defendants during said pre-trial conference, reflect that only *three* types were manufactured for the broadcast of the accused commercial, a copy of said invoice is attached hereto.

5. During the Hearing of "Defendants' Motion for Summary Judgment," held February 25, 1974 in removed Civil Action No. 74-70900 said Defendants' Counsel, at pages 3, 7 and 8 of the transcript, stated that such tapes have been destroyed.

6. It appears that any tape of the accused commercial that Defendants now possess was not used to broadcast the accused commercial when aired.

7. Therefore, Plaintiff objects to the admission of such tape as an exhibit for trial on the grounds that it appears that such tape is a forgery.



III. Single Station License Agreement, License Agreement Renewal, and BMI Agreement

1. Plaintiff objects to exhibits listed in paragraph 3 items (b), (e), (f), (g), (h), and (i) on the grounds that the accused commercial is a "new work" that is based on Plaintiff's copyrighted arrangement of his work entitled "Merry Christmas To You." *Nimmer On Copyright*, Sections 39, 40, 41, 42, 43, 44 and 45.

2. The accused commercial is not licensed by BMI.

3. The title of the accused commercial is not "Merry Christmas To You."

4. The accused commercial does not have a title.

5. The accused commercial is not part of the BMI repertoire known as "Schedule A."

6. Single Station License Agreement and Plaintiff's BMI Agreement covers only music that is listed on the BMI repertoire known as "Schedule A."

7. Said tape of the accused commercial, Plaintiff's BMI Agreement and Single Station License Agreement are irrelevant and immaterial.

Wherefore, Plaintiff objects to the admission of such exhibits at trial.

Respectfully submitted,

FLEMING S. JACKSON
Pro Se
5061 Dailey
Detroit, Michigan 48204
(313 894-3789

Dated: June 13, 1975

## APPENDIX HH

### CONFIRMATION OF PRODUCTION OF DOCUMENTS

This will confirm that on the 9th day of June, 1975, the Defendants, in the above-entitled action, by and through their attorneys, Cullen, Settle, Sloman & Cantor, P.C., 3200 Penobscot Building, Detroit, Michigan 48226, produced the originals and copies of the originals of the following:

a) Job No. 8627 and writing slip of Stone & Simons Advertising, Inc., for Job No. 8627.

b) Script of the accused Meyer Jewelry Company commercial, dated November 18, 1970.

c) Invoice No. 4723 of Stone & Simons Advertising, Inc., to AFTRA dated November 20, 1970.

d) Invoice No. 4854 of Stone & Simons Advertising, Inc., to Paul Winter dated November 19, 1970.

e) Invoice No. 1905 of Pioneer Recording Studio, Inc., to Stone & Simons Advertising, Inc., dated November 19, 1970.

f) Invoice No. 4853 of Stone & Simons Advertising, Inc., to Pioneer Recording Studio, Inc., dated November 19, 1970.

g) Invoice No. 29983 of Benyas-Kaufman Photographers to Stone & Simons Advertising, Inc., dated November 23, 1970.

h) Invoice No. 4986 of Stone & Simons Advertising, Inc., to Benyas-Kaufman Photographers dated November 19, 1970.

i) Invoice No. 4855 of Stone & Simons Advertising, Inc., to WKBD-TV dated November 20, 1970.

j) Production Billing No. 12-1129 dated November 31, 1970, of WKBD-TV to Stone & Simons Advertising, Inc.



k) Invoice No. 12-1129 of WKBD-TV to Stone & Simons Advertising, Inc., dated December, 1970.

l) Invoice No. 6311 of Sales Chartcraft, Inc., to Stone & Simons Advertising, Inc., dated November 23, 1970.

m) Invoice No. 4983 of Stone & Simons Advertising, Inc., to Sales Chartcraft, Inc., dated November 18, 1970.

n) Purchase receipt of Hudson's dated November 12, 1970, signed by Louis Schlossberg.

o) Contract T 1919 from Stone & Simons Advertising, Inc., to WWJ-TV, Channel 4, dated September 17, 1970.

p) Invoice No. 17488 of WWJ-TV, Channel 4, to Stone & Simons Advertising, Inc., of the cost and certification of the telecasts of the accused Meyer Jewelry Company commercial made through the facilities of WWJ-TV, Channel 4, dated November, 1970.

q) Invoice No. 17532 of WWJ-TV, Channel 4, to Stone & Simons Advertising, Inc., of the cost and certification of the telecasts of the accused Meyer Jewery Company commercial made through the facilities of WWJ-TV, Channel 4, dated December, 1970.

r) Credit Memo No. 25 of WWJ-TV, Channel 4, to Stone & Simons Advertising, Inc., of the cost and certification of a telecast of the accused Meyer Jewelry Company commercial made through the facilities of WWJ-TV, Channel 4, dated January 13, 1971.

s) Contract T 1918 from Stone & Simons Advertising, Inc., to WJBK-TV, Channel 2, dated September 17, 1970.

t) Invoice No. 20364 of WJBK-TV, Channel 2, to Stone & Simons Advertising, Inc., of the cost anf certification of the telecasts of the accused commercial made through the facilities of WWJ-TV, Channel 4, dated December, 1970.

u) Invoice No. 20364-1 of WJBK-TV, Channel 2, to Stone & Simons Advertising, Inc., of the cost and certification of the telecasts of the accused commercial made through the facilities of WJBK-TV, Channel 2, dated January, 1971.

v) Contract T 1920 from Stone & Simons Advertising, Inc., to WXYZ-TV, Channel 7, dated September 17, 1970.

w) Invoice No. 52820 of WXYZ-TV, Channel 7, to Stone & Simons Advertising, Inc., of the cost and certification of the telecasts of the accused commercial made through the facilities of WXYZ-TV, Channel 7, dated December 31, 1970.

Respectfully submitted,

FLEMING S. JACKSON
Pro Se
5061 Dailey
Detroit, Michigan 48204
(313) 894-3789

Dated: August 7, 1975

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**APPENDIX II**

WKBD TV PRODUCTION DEPARTMENT

Production Billing No. 12-1129

Date: 11/31/70

Client Purchase Order No. 4855

WKBD TV Acct. Exec: .....

Client Job No. 8627

Client & Address: Meyer Jewelers

Agency & Address: Stone & Simon Adv., 15301 W. Eight Mile
Detroit, Mich. 48235



**Production Information**

A. Date of Production: 11/20/70

B. Description:

| | | |
|---|---|---|
| 1. Studio production | 1 hr. | $280.00 |
| 2. 3 dubs to go | | 75.00 |
| 3. 6 minutes tape | | 36.00 |

C. Master Video Tape Number (if any): M-189

D. Other Remarks:

E. Total Charges: $391.00

Authorizing Manager: Arthur Freeman

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**APPENDIX JJ**

WKBD TV CH 50
Kaiser Broadcasting
Detroit 26955 West Eleven Mile Road
PO Box 359
Southfield Mi 48075
313/444 8500

Television Invoice

Month: Dec. '70
Invoice No. 12-1129

Stone & Simons Advertising
15301 W. Eight Mile
Detroit, Michigan

TERMS
Due on the 15th of the month
Following Telecast

Description

RE: Meyers Jewelers

Production charges as per attached:

Affidavit of performance:

We Warrant Dates and Times of Broadcast to
Be in Accordance With Certified Station Logs.

| | |
|---|---|
| Total Time Charges | ..... |
| Total Production | $391.00 |
| Other | |
| Subtotal | $391.00 |
| Agency Commission | |
| Net | $391.00 |

By: Pam Cook
Authorized Signature



**APPENDIX KK**

BROADCAST MUSIC, INC.
589 Fifth Avenue New York, N.Y. 10017

Date: July 9, 19[illegible]

Mr. Fleming S. Jackson
5061 Dailey
Detroit, Michigan 48204

Dear Mr. Jackson:

The following shall constitute the agreement between us:

1. As used in this agreement:

(a) The word "period" shall mean the term of one year from January 1, 1968 to December 31, 1968, and continuing from year to year thereafter unless terminated by either party at the end of said first year or on any anniversary date thereof, upon at least thirty (30) days' notice by registered or certified mail.

(b) The word "works" shall mean:

(i) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators during the period; and

(ii) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators prior to the period, except those in which there is an outstanding grant of the right of public performance to a person other than a publisher affiliated with BMI.

2. You hereby warrant and represent that Schedule "A" hereto is a complete listing of all the works which have been published in printed copies or commercially recorded or which are being currently performed or which you regard as likely to be performed; that the information contained in said Schedule is true and correct; and that no performing rights in any of said works have been granted to others except as specifically set forth in said Schedule.

3. You agree that in each instance that a work not listed on Schedule "A" is published in printed copies or recorded commercially or in synchronization with film or tape, or is regarded by you as likely to be performed, whether such work is composed prior to the execution of this agreement or hereafter during the period, you will promptly furnish to us a copy of the work together with a supplement to Schedule "A" setting forth the information with respect thereto called for by said Schedule. Such action by you shall constitute a warranty that the information contained in such supplement is true and correct.

4. You hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to us except to the extent of any prior grants listed on Schedule "A" hereto.

(b) The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for sychronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.



(c) The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta, or musical comedy or more than five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally written for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

6. (a) As first consideration for all rights granted to use hereunder, we agree to pay you, with respect to each of the works in which we obtain and retain exclusive performing rights during the period:

(i) For performances of a work on broadcasting stations in the United States, its territories and possessions and Canada, amounts calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar parformances of similar compositions. The number of performances for which you shall be entitled to payment shall be estimated by us in accordance with our then current system of computing the number of such performances.

(ii) All monies received by us from any performing rights licensing organization outside of the United States, its territories and possessions and Canada, which are designated by such performing rights licensing organization as the author's share of foreign performance royalties earned by your works after the deduction of ten percent (10%) of the gross amount thereof to cover our handling charge.

(b) In the case of a work composed by you with one or more collaborators, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of collaborators, unless you shall have transmitted to us a copy of an agreement between you and your collaborators, providing for a different division of payment.

(c) We shall have no obligation to make payment hereunder with respect to (i) any performance of a work which occurs prior to the date on which we have received from you all of the information and material with respect to such work which is referred to in paragraphs 2 and 3 hereof, or (ii) any preformance of a work for which you receive payment of performance royalties from the publisher thereof. You waive the right to receive performance royalties from the publisher of any work with respect to any and all performances thereof for which you receive payment from us hereunder.

7. We will furnish statement to you at least twice during each year of the period showing the number of performances as computed pursuant to sub-paragraph (a) (i) of paragraph 6 hereof and at least once during each year of the period showing the monies due pursuant to sub-paragraph (a) (ii) of paragraph 6 hereof. Each statement shall be accompanied by payment to you, subject to all proper deductions for advances, if any, of the sum thereby shown to be due for such performances.

8. (a) Notwithstandnig the termination of this agreement, we shall continue to make payments to you with respect to per-



formances of any of the works in which we have exclusive performing rights for so long as we continue to have such exclusive rights; but nothing in this agreement shall require us to continue licensing any such work. The amounts of such payments shall be calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions.

(b) Our obligation to continue payment to you after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon our receipt in the United States of payments designated by foreign performing rights organizations as the author's share of foreign performance royalties earned by your works. Payment of such foreign royalties shall be subject to deduction of our then current handling charge applicable to our affiliated writers.

9. In the event that you terminate this agreement pursuant to sub-paragraph (a) of paragraph 1 hereof at a time when, after crediting all earnings reflected by the statements rendered to you prior to the effective date of such termination, there remains an unearned balance of advances made to you by us, such termination shall not be effective with respect to the works then embraced by this agreement unless and until thirty (30) days after the unpaid balance of advances shall be repaid by you or until a statement is rendered by us at our normal accounting period showing that such unearned balance of advances has been fully recouped by us.

10. You warrant and represent that you have the right to enter into this agreement; that you are not bound by any prior commitments which conflict with your commitments hereunder; that each of the works, composed by you alone or with one or more collaborators, is original; and that exercise of the rights granted by you herein will not constitute an infringement

of copyright or violation of any other right of, or unfair competition with, any person, firm or corporation. You agree to indemnify and hold harmless us and our licensees from and against any and all loss or damage resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by you in this agreement. Upon notification to us or any of our licensees of a claim with respect to any of the works, we shall have the right to exclude such work from the agreement and/or to withhold payment of all sums which become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

11. (a) We shall have the right, upon written notice to you, to exclude from this agreement, at any time, any work which in our opinion (i) is similar to a previously existing composition and might constitute a copyright infringement, or (ii) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (iii) is offensive, in bad taste or against public morals, or (iv) is not reasonably suitable for performance.

(b) In the case of works which in our opinion are based on compositions in the public domain, we shall have the right, upon written notice to you, either (i) to exclude any such work from this agreement, or (ii) to classify any such work as entitled to receive only a fraction of the full credit that would otherwise be given for performances thereof.

(c) In the event that any work is excluded from this agreement pursuant to paragraph 10 or sub-paragraph (a) or (b) of this paragraph 11, all rights in such work shall automatically revert to you ten (10) days after the date of our notice to you of such exclusion. In the event that a work is classified for less than full credit under sub-paragraph (b) (ii) of this paragraph 11, you shall have the right, by giving notice to us, within ten (10) days after the date of our letter advising you of the credit



allocated to the work, to terminate our rights therein, and all rights in such work shall thereupon revert to you.

12. In each instance that you write, or are employed or commissioned by a motion picture producer to write, during the period, all or part of the score of a motion picture intended primarily for exhibition in theaters, or by the producer of a dramatico-musical work or revue for the legitimate stage to write, during the period, all or part of the musical compositions contained therein, we agree to advise the producer of the film that such part of the score as is written by you may be performed as part of the exhibition of said film in theaters in the United States, its territories and possessions, without compensation to us, or to the producer of the dramatico-musical work or revue that your compositions embodied therein may be performed on the stage with living artists as part of such dramatico-musical work or revue, without compensation to us. In the event that we notify you that we have established a system for the collection of royalties for performance of the scores of motion picture films in theaters in the United States, its territories and possessions, we shall no longer be obligated to take such action with respect to motion picture scores.

13. You make, constitute and appoint us, or our nominee, your true and lawful attorney, irrevocably during the term hereof, in our name or that of our nominee, or in your name, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by you hereunder, and to recover damages in respect to or for the infringement or other violation of the said rights, and in our sole judgment to join you and/or others in whose names the copyrights to any of the works may stand; to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes

in relation to the works, provided that any action or proceeding commenced by us pursuant to the provisions of this paragraph shall be at our sole expense and for our sole benefit.

14. You agree that you, your agents, employees or representatives will not, directly or indirectly, solicit or accept payment from writers for composing music for lyrics or writing lyrics to music or for reviewing, publishing, promoting, recording or rendering other services connected with the exploitation of any composition, or permit use of your name or your affiliation with us in connection with any of the foregoing. In the event of a violation of any of the provisions of this paragraph 14, we shall have the right, in our sole discretion, by giving you at least thirty (30) days' notice by registered or certified mail, to terminate this agreement. In the event of such termination no payments shall be due to you pursuant to paragraph 8 hereof.

15. No monies due or to become due to you shall be assignable, whether by way of assignment, sale or power granted to an attorney-in-fact, without our prior written consent. If any assignment of such monies is made by you without such prior written consent, no rights of any kind against us will be acquired by the assignee, purchaser or attorney-in-fact.

16. All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of us shall by written notice to the other have the right to appoint one arbitrator, provided, however, that if within ten (10) days following the giving of such notice by one of us the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators



are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either of us may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on us and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

17. Any notice sent to you pursuant to the terms of this agreement shall be valid if addressed to you at the last address furnished by you in writing to our Department of Writer Administration.

18. This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

Very truly yours,

BROADCAST MUSIC, INC.
By GEORGE M. MARLO
Director
Department of
Writer Administration

Accepted and Agreed to:

FLEMING SEABORN JACKSON

———

Schedule "A"

| Title | Co-Writers (if any) | Your Percentage of Writer Credit | Publisher | Any Other Grant of Performing Rights by You or Your Co-Writers |
|---|---|---|---|---|
| Cry Before I Go | Al Smith | 50% | Alstein | |
| Merry Christmas To You | | 100% | Tru-Soul | |

---

## APPENDIX LL

### ORDER DENYING MOTION TO REMAND

Upon Hearing to Open Court, with the parties hereto having been represented by their respective counsel, on Plaintiff's Motion to Remand Civil Action No. 74-70900 to the Circuit Court for the County of Wayne, State of Michigan, and Defendants' Motion to Consolidate this action with Civil Actions Nos. 39,071 to 39,074, It Is Hereby Ordered:

(1) Plaintiff's Motion to Remand Civil Action No. 74-70900 is denied.

* * * * * * *

(3) The Clerk for the United States District Court is ordered to release the Defendants' bond of Two Hundred Dollars ($200.00) filed with Defendants' Petition for Removal and Consolidation.



Done and Ordered at Detroit, Michigan, this 19 day of Feb., 1974.

/s/ CORNELIA KENNEDY
United States District Judge

Approved as to Form:

/s/ PAUL D. MULLER
Attorney for Plaintiff

/s/ RAYMOND L. SCOTT
Attorney for Defendants

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## APPENDIX MM

In the United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson, Plaintiff, v. Stone and Simons Advertising Inc., Et Al., Defendants. | Civil Action Nos. 39,071 to 39,074 74-70900 Judge Cornelia Kennedy |

### SUMMARY JUDGMENT AS TO DEFENDANT MEYER ROSENBAUM

Defendants having moved for Summary Judgment and the Court having given its decision and ordered Summary Judgment in favor of Meyer Rosenbaum, only;

It Is Ordered and Adjudged that Plaintiff take nothing and that the action against Defendant Meyer Rosenbaum is Dismissed.

Done and Ordered at Detroit, Michigan, this 18 day of April, 1974.

/s/ CORNELIA KENNEDY
United States District Judge

Date: Apr. 18, 1974

## APPENDIX NN

United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson,<br>Plaintiff,<br>v.<br>Stone and Simon Advertising, Inc., et al.,<br>Defendants. | Civil Actions:<br>No. 39071 to<br>No. 39074; and<br>No. 74-70900 |

SUMMARY JUDGMENT AS TO DEFENDANTS WXYZ-TV, WXYZ-TV, INC., WWJ-TV, THE DETROIT NEWS, THE EVENING NEWS ASSOCIATION, WJBK-TV, AND STORER BROADCASTING COMPANY

Defendants having moved for Summary Judgment, and the Court having given its decision and ordered Summary Judgment in favor of defendant television stations, only;



It Is Ordered and Adjudged that the plaintiff take nothing, and that the action against the defendant television stations, namely WXYZ-TV, WXYZ-TV, Inc., WWJ-TV, The Detroit News Association, WJBK-TV, and Storer Broadcasting Company, be Dismissed.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: April 12, 1974
Detroit, Michigan

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## APPENDIX OO

United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson,<br>Plaintiff,<br>v.<br>Stone and Simon Advertising, Inc., et al.,<br>Defendants. | Civil Action Nos.<br>39071 to 39074;<br>and 74-70900 |

AMENDED
SUMMARY JUDGMENT AS TO DEFENDANTS WXYZ-TV, WXYZ-TV, INC., WWJ-TV, THE DETROIT NEWS, THE EVENING NEWS ASSOCIATION, WJBK-TV, AND STORER BROADCASTING COMPANY

Defendants having moved for summary judgment, and the Court havin given its decisions and ordered Summary Judgment in favor of defendant television stations, only;

It Is Ordered and Adjudged that plaintiff take nothing and that the action against the defendant television stations, namely WXYZ-TV, WXYZ-TV, Inc., WWJ-TV, The Detroit News, The Evening News Association, WJBK-TV, and Storer Broadcasting Company, be Dismissed.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: April 15, 1974
Detroit, Michigan

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## APPENDIX PP

### ORDER
### DIRECTING MOTIONS BE SUBMITTED ON BRIEFS

Pursuant to Rule IX(j), Rules of the United States District Court for the Eastern District of Michigan;

It Is Ordered that the plaintiff's Motion for Jury Trial be submitted on briefs without oral argument.

CORNELIA G. KENNEDY
United States District Judge
219 Federal Building
Detroit, Michigan 48226

Dated: May 23, 1975
Detroit, Michigan

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## APPENDIX QQ

### ORDER
### DENYING MOTION FOR JURY TRIAL

On October 19, 1972, plaintiff filed four separate complaints of copyright infringement. The complaints allege the same factual basis: that plaintiff's copyrighted material was used in an unauthorized manner as background music for television advertisements. The complaints differ only as to the named television station-defendants. No jury demand was filed with the complaints. A separate action alleging the same facts and theory of recovery was filed on January 2, 1974, by plaintiff in Wayne County Circuit Court. This complaint which contained a jury demand was removed to this Court by petition on January 2, 1974. On April 15, 1974, the Court consolidated the four original complaints for all purposes and the removed action for purposes of discovery only. On November 5, 1974, plaintiff filed a Motion for Jury Demand in the four original actions. Rule 38(b) of the Federal Rules of Civil Procedure requires that a demand for a jury trial be served not later than ten (10) days "after the service of the last pleading directed to such issue." Failure to do so constitutes a waiver of a jury trial. Federal Rule of Civil Procedure 38(d).

Plaintiff has waived any right he may have had to a jury trial in the four actions by not filing a timely demand. The Motion is, accordingly, Denied.

It Is So Ordered.

CORNELIA G KENNEDY
United States District Judge

Dated: June 5, 1975
Detroit, Michigan

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## APPENDIX RR

United States District Court
Eastern District of Michigan
Southern Division

### STANDING ORDER RE FINAL PRETRIAL CONFERENCES IN JUDGE KENNEDY'S COURT IN *NON-JURY* CASES

Civil Action No.: 39071 Title: Jackson v. Stone et al.

Final pretrial conference has been scheduled in this Action on: Monday, August 13, 1973 at 3:00

1. You are directed to confer with your opponent(s) in advance of the pretrial and enter into a written stipulation of all uncontested facts in such form that it can be offered as the first evidence at trial. If your opponent refuses or neglects to confer, you are directed to prepare a proposed stipulation and bring it with you to the pretrial conference;
2. Prepare and submit to opposing counsel and file with the Court at least three (3) days before the pretrial conference, a concise summary (less than one page, if possible) of your theory of the case;
3. Prepare and bring with you to the pretrial conference a schedule of all exhibits which will be offered on behalf of your client(s) at trial, a copy of which must be served on opposing counsel three (3) days prior to pretrial. At the pretrial conference counsel will be required to stipulate to the admission of these exhibits or to state the specific reasons why he (they) will not so stipulate. Only exhibits so listed on such schedule shall be offered in evidence, except for good cause shown;



4. Prepare and bring with you to the pretrial conference an itemized statement of special damages. Counsel will be requested to stipulate to those items not in dispute;
5. Your attention is called to Rule 15 (Rules of the U.S. District Court for the Eastern District of Michigan, March 1, 1958) relating to trial briefs. Compliance with this Rule is required by the Court;
6. Preliminary draft of proposed findings of fact should be presented to the Court and opposing counsel before the commencement of trial.

Dated: July 2, 1973
Detroit, Michigan

/s/ CORNELIA G. KENNEDY
United States District Judge
Chambers—219 Federal Building
Detroit, Michigan 48226
(Telephone: 313-226-6893)

Copies to Counsel This Date.

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## APPENDIX SS

### STANDING ORDER RE FINAL PRETRIAL CONFERENCES IN JUDGE KENNEDY'S COURT IN *NON-JURY* CASES

(Order applies in all cases: 39071, 39072, 39073, 39074)

Civil Action No.: 39071 et al.

Title: Jackson v. Stone & Simon et al.

Final pretrial conference has been scheduled in this action on: Monday, June 9, 1975 at 3:30 p.m.

1. You are directed to confer with your opponent(s) in advance of the pre-trial and enter into a written stipulation of all uncontested facts in such form that it can be offered as the first evidence at trial. If your opponent refuses or neglects to confer, you are directed to prepare a proposed stipulation, serve it on opposing counsel five (5) business days before the pretrial conference, and bring it with you to the pretrial conference;

2. Prepare and submit to opposing counsel and file with the Court at least five (5) days before the pretrial conference, a concise summary (less than one (1) page, if possible) of your theory of the case;

3. Prepare and bring with you to the pretrial conference a schedule of all exhibits which will be offered on behalf of your client(s) at trial, a copy of which must be served on opposing counsel five (5) days prior to pretrial. At the pretrial conference counsel will be required to stipulate to the admission of these exhibits or to state the specific reasons why he (they) will not so stipulate. Only exhibits so listed on such schedule shall be offered in evidence, except for good cause shown;

4. Prepare and bring with you to the pretrial conference an itemized statement of special damages. Counsel will be requested to stipulate to those items not in dispute;

5. Prepare and bring with you to the pretrial conference a complete list of witnesses you intend to call. Indicate which of these witnesses will be called in the absence of unreasonable notice to opposing counsel to the contrary and which may be called as a possibility only;

6. Your attention is called to Rule 15 (Rules of the United States District Court for the Eastern District of Michigan,



March 1, 1968) relating to trial briefs. Compliance with this Rule is required by the Court;

7. Preliminary draft of proposed findings of fact should be presented to the Court and opposing counsel before the commencement of trial;

8. No amendment to pleadings shall be allowed except by special leave of the Court;

9. This pretrial order and the documents ordered herein shall supplement the pleadings already presented and will govern the course of the trial of this cause, unless modified to prevent manifest injustice;

10. Continuances of trial dates, or during the trial, will not be granted because of the unavailability of a witness since the Court has facilities for taking videotape depositions.

It Is So Ordered.

CORNELIA G. KENNEDY
United States District Judge
Eastern District of Michigan
219 Federal Building (Chambers)
Detroit, Michigan 48226
Telephone: (313) 226-6893

Dated: April 14, 1975
Detroit, Michigan

Copies to Counsel This Date.

## APPENDIX TT

United States District Court for the
Eastern District of Michigan
Southern Division

Fleming S. Jackson

v.

Stone & Simon Advertising, et al.

No. 39,071, 39072, 39,073, 39,074

Take Notice that the above-entitled case has been set for bench trial at 9:00 a.m., on Tuesday, September 16, 1975, at 225 Federal Building, Detroit, Michigan, before the Honorable Cornelia G. Kennedy, United States District Judge.

Date June 11, 1975

HENRY R. HANSSEN, Clerk
By THOMAS G. RICHARDS, Deputy Clerk
Court Clerk to
Hon Cornelia G. Kennedy
219 Federal Building
Detroit, Michigan 48226

Telephone: [313] 226-6893

To Fleming S. Jackson
Ray Scott

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## APPENDIX UU

United States District Court
Eastern District of Michigan
Southern Division

Fleming S. Jackson,
Plaintiff,

vs.

Stone & Simons Advertising, Inc., et al.,
Defendants.

Civil Action No. 39,071, 39,072, 39,073, 39,074.

### JUDGMENT DISMISSING ACTION

For the reasons stated in the Opinion and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, dated August 29, 1975, and in the Court's ruling from the bench on August 11, 1975, the above-entitled actions are hereby dismissed.

s/ CORNELIA G. KENNEDY
United States District Judge

Dated: August 29, 1975
Detroit, Michigan

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## APPENDIX VV

In the United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson, Plaintiff, vs. Stone & Simons Advertising, Inc., et al., Defendants. | Civil Action Nos. 39,071 to 39,074 and 74-70900 Judge Cornelia G. Kennedy |

### JUDGMENT FOR ATTORNEY FEES

Plaintiff, Fleming S. Jackson, is hereby ordered to pay to the Defendants in the above entitled actions the sum of One Thousand Seventy-Five Dollars and fifty-seven cents ($1,075.57), and Defendants shall have execution thereof.

Done and Ordered at Detroit, Michigan, this 29th day of August, 1975.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: August 29, 1975

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## APPENDIX WW

In the United States District Court
Eastern District of Michigan
Southern Division

| | |
|---|---|
| Fleming S. Jackson, Plaintiff, vs. Stone & Simons Advertising, Inc., et al., Defendants. | Civil Action No. 74-70900 Judge Cornelia G. Kennedy |

### JUDGMENT DISMISSING ACTION

For the reasons stated in the Opinion and Order Granting Defendants' Motion for Summary Judgment, the above-entitled action is hereby dismissed.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: 9/26/75

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## APPENDIX XX

United States District Court
Eastern District of Michigan
Southern Division

Fleming Jackson,
Plaintiff,
v.
Stone and Simon Advertising, Inc.; et. al.,
Defendants.

Civil Action No. 74-70900

### JUDGMENT FOR ATTORNEY'S FEES AND COSTS

For the reasons stated in the Court's Opinion and Order Setting Attorney's Fees and Costs, judgment is hereby entered for defendants, against plaintiff, in the amount of ONE THOUSAND EIGHT HUNDRED EIGHTY-THREE DOLLARS AND Fifty-seven Cents ($1,883.57). This judgment is in addition to a previous judgment for attorney fees entered August 29, 1975.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: October 16, 1975
Detroit, Michigan

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## APPENDIX YY

### ORDER DIRECTING MOTIONS BE SUBMITTED ON BRIEFS

Pursuant to Rule IX(j), Rules of the United States District Court for the Eastern District of Michigan;

It Is Ordered that the (defendants') Motion for Summary Judgment of Dismissal be submitted on briefs without oral argument. Any response to the motion must be filed on or before September 2, 1975.

/s/ CORNELIA G. KENNEDY
United States District Judge
219 Federal Building
Detroit, Michigan 48226

Dated: September 8, 1975
Detroit, Michigan

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## APPENDIX ZZ

### ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

It Is Ordered that plaintiff's Motion to Strike Defendants' Motion for Summary Judgment be, and the same hereby is, denied.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: August 29, 1975
Detroit, Michigan

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## APPENDIX III

ORDER
VACATING NOTICE OF HEARING

The plaintiff having notice for hearing his "Motion to Reverse and/or Set Aside and/or Vacate Void Judgments" and it appearing to the Court that the Motion is an untimely motion for rehearing; and that Rule IX(a), United States District Court Rules, Eastern District of Michigan, provides that there shall be no oral arguments on motions for rehearing;

It Is Hereby Ordered that the Motion shall be Vacated.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: August 31, 1976
Detroit, Michigan

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## APPENDIX IV

Letterhead of
Pioneer Recording Studio, Inc.
70 Minute Hour
341-5868 20014 James Couzens
Detroit, Michigan 48235

December 15, 1970

Mr. Fleming Jackson
5061 Dailey Avenue
Detroit, Michigan 48204

Dear Fleming:

Through Stone and Simon Advertising, Inc., we learned of your recent letter to Meyers Jewelry in reference to the use a segment



of music entitled "Merry Christmas to You." Please be advised through contractual agreements made with you in October 1966, we obtained the publishing rights and your permission to use said tune. We felt that the additional exposure for this tune might be beneficial to both you and ourselves. We did not charge anyone for the use of the ten seconds of musical bridge that occurred in this tune.

If there are any further questions, please direct them to my attention at Pioneer Recording Studio, Inc.

Thank you.

Sincerely,

Pioneer Recording Studio, Inc.
/s/ Gary A. Rubin, President
GAR/md

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## APPENDIX V

Invoice
Stone and Simons Advertising, Inc.
15301 West Eight Mile Road, Detroit 35, Mchigan
342-4200

Your Order No. No. 4570
Our Order No.

Date: December 28, 1970
Meyer Jewelry Company
Woodward at Grand River
Detroit, Michigan 48226

| Description | Price |
|---|---|
| 120—10 sec. spot announcements on WWJ-TV November 26-December 23. | $7200.00 |

90—10 sec. spot announcements on WXYZ-TV
Dec. 3-23. 5400.00

90—10 sec. spot announcements on WJBX-TV
Dec. 3-23. 6300.00

NOTE: Affidavits to come as received from stations.

*Job No. 8627*

Production of 1—10 second full color VTR commercial, "Gift Elegance." Including: Creative layout, color artwork, announcer, talent at union scale plus Pension and Welfare fees, audio recording, studio facilities, production engineers, staging personnel, props, production supervision, VTR facilities, raw tape, reels, sales tax and duplicate tapes for 3 stations. 997.58

Terms: Net 10 Days

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**APPENDIX VI**

Page 3

Form E

| Class | Registration No. |
|---|---|
| E | Eu 928608 |

Do not write here

CERTIFICATE

Registration of a Claim to Copyright

In a musical composition the author of which is a citizen or domiciliary of the United States of America or which was first published in the United States of America



This is to Certify that the statements set forth in this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

(Seal)

(Illegible)
Register of Copyrights
United States of America

1. Copyright Claimant(s) and Address(es):

Name Fleming S. Jackson

Address 5061 Dailey, Detroit, Michigan 48204

Name .....

Address .....

2. Title: Merry Christmas to You
(Title of the musical composition)

3. Authors:

Name Fleming S. Jackson

(Legal name followed by pseudonym if latter appears on copies)
Citizenship: U.S.A. √ Other .....
(Check if U.S. citizen) (Name of country)

Domiciled in U.S.A. Yes √ No ... Address 5061 Dailey Detroit, Mich. Author of Words & Music
(State which: words, music, arrangement, etc.)

(b) Place of Publication:

.....
(Month) (Day) (Year)

(b) Place of Pumlication:

.....
(Name of country)

5. Previous Registration of Publication:

Was work previously registered? Yes ... No. √ Date of registration ..... Registration number .....

Was work previously published? Yes ... No √ Date of publication ..... Registration number .....

Is there any substantial NEW MATTER in this version? Yes .... No .... If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version.

.....

*Complete all applicable spaces on next page*

6. Deposit account: .....

7. Send correspondence to:

Name ..... Address .....

8. Send certificate to:

Fleming S. Jackson
5061 Dailey
Detroit Michigan 48204

**Information concerning copyright in musical compositions**

*When To Use Form E.* Form E is appropriate for unpublished and published musical compositions by authors who are U.S. citizens or domiciliaries, and for musical compositions first published in the United States.

*What Is a "Musical Composition"?* The term "musical composition" includes compositions consisting of music alone, or of words and music combined. It also includes arrangements and other versions of earlier compositions, if new copyrightable work of authorship has been added.



—*Song Lyrics Alone.* The term "musical composition" does not include song poems and other works consisting of words without music. Works of that type are not registrable for copyright in unpublished form.

—*Sound Recordings.* Phonograph records, tape recordings, and other sound recordings are not regarded as "copies" of the musical compositions recorded on them, and are not acceptable for copyright registration. For purposes of deposit, the musical compositions should be written in some form of legible notation. If the composition contains words, they should be written above or beneath the notes to which they are sung.

*Duration of Copyright.* Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

**Unpublished musical compositions**

*How To Register a Claim.* To obtain copyright registration, mail to the Register of Copyrights, Library of Congress, Washington, D.C., 20540, one complete copy of the musical composition, an application Form E, properly completed and signed, and a fee of $6. Manuscripts are not returned, so do not send your only copy.

*Procedure To Follow if Work Is Later Published.* If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published edition must contain a copyright notice in the required form and position.

**Published musical compositions**

*What Is "Publication"?* Publication, generally, means the sale, placing on sale, or public distribution of copies. Limited distribution of so-called "professional" copies ordinarily would not constitute publication. However, since the dividing line between a preliminary distribution and actual publication may be difficult to determine, it is wise for the author to affix notice of copyright to copies that are to be circulated beyond his control.

*How To Secure Copyright in a Published Musical Composition:*

1. *Produce copies with copyright notice*, by printing or other means of reproduction.
2. *Publish the work.*
3. *Register the copyright claim*, following the instructions on page 1 of this form.

*The Copyright Notice.* In order to secure and maintain copyright protection for a published work, it is essential that all copies published in the United States contain the statutory copyright notice. This notice shall appear on the title page or first page of music and must consist of three elements:

1. *The word "Copyright," the abbreviation "Copr," or the symbol* © Use of the symbol © may result in securing copyright in countries which are parties to the Universal Copyright Convention.

2. *The year date of publication.* This is ordinarily the date when copies were first placed on sale, sold, or publicly distributed. However, if the work has been registered for copyright in unpublished form, the notice should contain the year of registration; or, if there is new copyrightable matter in the published version, it should include both dates.



3. The *name of the copyright owner (or owners)*. Example: © John Doe 1966.

NOTE: If copies are published without the required notice the right to secure copyright is lost and cannot be restored.

For Copyright Office Use Only

Application received: Mar. 11, 1966

One copy received: Mar. 11, 1966

Two copies received:

Fee received:

75615 Mar 11 '66

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## APPENDIX VII

### 17 USC § 1

**Exclusive Rights as to Copyrighted Works**

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages ar dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from any method be exhibited, part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works



of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount

found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

[17 USCA pp. 5, 6]

## 17 USC § 2

### Rights of Author or Proprietor of Unpublished Work

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

[17 USCA p. 28]

## 17 USC § 3

### Protection of Component Parts of Work Copyrighted; Composite Works or Periodicals

The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.

[17 USCA p. 47]



## 17 USC § 4

### All Writings of Author Included

The works for which copyright may be secured under this title shall include all the writings of an author.

[17 USCA p. 49]

## 17 USC § 7

### Copyright on Compilations of Works in Public Domain or of Copyrighted Works; Subsisting Copyrights Not Affected

Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyrights in such original works.

[17 USCA p. 72]

## 17 USC § 11

### Registration of Claim and Issuance of Certificate

Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

[17 USCA p. 101]

## 17 USC § 27

### Copyright Distinct From Property in Object Copyrighted; Effect of Sale of Object, and of Assignment of Copyright

The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained. July 30, 1947, c. 391, § 1, 61 Stat. 652.

[17 USCA p. 137]

## 17 USC § 30

### Same; Record

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded. July 30, 1947, c. 391, § 1, 61 Stat. 652.

[17 USCA p. 155]

## 17 USC § 101

### Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:



(a) INJUNCTION.—To an injunction restraining such infringement;

(b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statute, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statute, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

(c) IMPOUNDING DURING ACTION.—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) DESTRUCTION OF INFRINGING COPIES AND PLATES.—To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1,



subsection (e), of this title: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

[17 USCA pp. 157-159]

## 17 USC § 115

### Limitations of Criminal Proceedings

No criminal proceedings shall be maintained under the provisions of this title unless the same is commenced within three years after the cause of action arose. July 30, 1947, c. 391, § 1, 61 Stat. 652.

[17 USCA p. 309]

## 17 USC § 116

### Costs; Attorney's Fees

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

[17 USCA p. 309]

## APPENDIX VIII

### AFFIDAVIT.

Theodora Zavin, being duly sworn, states that:

1. This affidavit is submitted in response to specific questions raised by Plaintiff.

2. The recording rights granted by Broadcast Music, Inc. to its licensees are those described in my affidavit dated August 16, 1973. Broadcast Music, Inc. does not purport to license the right to reproduce commercial recordings.

3. The right to perform works in the BMI repertoire granted to a broadcaster licensee authorizes performance of such works by means of either live performance or performance of recordings and is unaffected by the question of whether the programming of music broadcast by the licensee is prepared by employees of the broadcasting station, its advertisers or advertising agencies.

Further, Affiant sayeth not.

/s/ THEODORA ZAVIN
Senior Vice President, Broadcast Music, Inc.

State of New York }
County of New York } ss.

The foregoing was sworn and subscribed to before me by the identified affiant on this 9th day of October, 1973.

/s/ EVELYN BUCKSTEIN
Notary Public

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## APPENDIX IX

### AFFIDAVIT

I, the undersigned, Robert M. DuRant, am a band leader and a member of the Detroit Federation of Musicians, Local No. 5. I play the piano, and on frequent occasions I am hired to do arranging, recording sessions, and performances on stage, in clubs, in hotels etc. for various clients. I have been a full time professional musician for twenty-five years, and I am a member of the Board of Directors of the Detroit Federation of Musicians, Local No. 5.

In October, 1966 I was hired by Fleming S. Jackson to write two arrangements to a song composed by him entitled "Merry Christmas To You". One arrangement was to accompany a vocal version of the song and the other arrangement strictly an instrumental version of the song. I was paid $305.00 by Fleming S. Jackson for my services.

In October, 1966 I was hired by Fleming S. Jackson, as the leader of a thirteen piece orchestra, to record the two arrangements of his song on October 14, 1966 at United Sound Systems Recording Laboratory on Second Boulevard. In the recording session I played piano and celeste.

In December, 1970 I learned from Fleming S. Jackson that part of the vocal arrangement of the song "Merry Christmas To You" was being used in a Meyer Jewelry Company commercial as background music on television.

After listening to the commercial, while it was being played on the air in December, 1970, I did not have the slightest doubt that part of the same arrangement of the song that I arranged

and recorded in October, 1966 entitled "Merry Christmas To You", was being used in this commercial. Especially significant was the chimes solo played by George Hamilton. I put the chimes in the arrangement to embellish the song with a Christmas atmosphere or Christmas flavor. Without the chimes the arrangement of "Merry Christmas To You" would have lost its impact as a Christmas production. The chimes projected the Christmas image that the success of the arrangement depended upon. The chimes solo also represented a strong portion of the melody of the song.

In January, 1971 Fleming S. Jackson and I testified at a board meeting at The Detroit Federation of Musicians regarding the use of this music in the Meyer Jewelry Company commercial because neither I, as leader of the orchestra, nor Fleming S. Jackson had authorized anyone to use any portion of "Merry Christmas To You" in a commercial for Meyer Jewelry Company. The Board took the matter under advisement with the prospect of working out some sort of settlement, on behalf of the musicians involved, with the person or persons responsible.

In the spring of 1972, James R. Lewis, Administrative Assistant for the Detroit Federation of Musicians, held a meeting in his office which I and several other people, including Gary Rubin attended. Gary Rubin identified the music that was used in the Meyer Jewelry Company commercial in December, 1970, as being part of the arrangement made by me of the song "Merry Christmas To You".

Gary Rubin promised to pay the sum of $175.00. This sum represented a compromise of the money due the musicians for the use of their services, as required by The Detroit Federation of Music rules, when music recorded for one purpose is used for another. The $175.00 was never paid.

/s/ ROBERT M. DuRANT



Subscribed and sworn before me this 30th day of June, 1973 in the County of Wayne, City of Detroit, Michigan.

/s/ FREDERICK G. SCULLY
Notary Public, Wayne County, Mich.
My Commission Expires Nov. 6, 1972

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## APPENDIX X

No. 76-1080

United States Court of Appeals
For the Sixth Circuit

Fleming S. Jackson,
Petitioner,

v.

United States District Court for the Eastern District of Michigan, Southern Division at Detroit,
Respondent

### ORDER

(Filed March 25, 1976)

Before: Weick, Edwards and Engel, Circuit Judges

This matter is before the court upon petitioner's application for a writ of mandamus to be issued to the Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, Southern Division, directing her to reverse her previous orders granting summary judgments to defendants in petitioner's cause of action alleging copyright infringement

and conversion. The response of the district judge correctly noted that all matters raised by the petition for writ of mandamus could properly have been raised on direct appeal. The extraordinary writ of mandamus is not a substitute for appeal, nor may it be used to circumvent the appellate procedures of this court. Accordingly,

It Is Ordered that said petition be and it is hereby denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

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## APPENDIX XI

United States Court of Appeals
For the Sixth Circuit

Fleming S. Jackson,
Petitioner,
v.
The Honorable Cornelia G. Kennedy,
Respondent.
No. 76-1080

(Filed February 19, 1976)

### RESPONSE TO PETITION FOR WRIT OF MANDAMUS

(Filed Feb. 19, 1976)

In response to the Petition for Writ of Mandamus filed by Petitioner Fleming S. Jackson, the District Judge respectfully



states to the Court of Appeals that in cases numbered 39071-74, summary judgments or partial summary judgments were entered on the following dates: April 12, 1974 (an amended summary judgment was entered April 15, 1974); April 18, 1974; and August 29, 1975. The last of these summary judgments disposed of all remaining claims, and a judgment of dismissal was entered on August 29, 1975.

In case number 74-70900, summary judgments or partial summary judgments were entered April 12, 1974 (an amended summary judgment was entered April 15, 1974); August 29, 1975; and September 26, 1975. The last of these summary judgments disposed of all remaining claims, and a judgment of dismissal was entered on September 26, 1975.

With respect to each summary judgment or partial summary judgment, the court either filed a written opinion or dictated an opinion from the bench at the time of oral argument.

All of the matters raised by the Petition for Writ of Mandamus could properly have been raised on direct appeal.

Date: February 3, 1976,
Detroit, Michigan.

/s/ CORNELIA G. KENNEDY
Respondent

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## APPENDIX XII

No. 76-2523

United States Court of Appeals
For the Sixth Circuit

Fleming S. Jackson

Plaintiff-Appellant

v.

Stone & Simons Advertising, Inc., et al.

Defendants-Appellees

ORDER

(Filed March 28, 1977)

Before: Weick, Lively and Engel, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellant, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore Ordered that the petition for rehearing be and it hereby is denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

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## APPENDIX XIII

No. 74-1263

United States Court of Appeals
For the Sixth Circuit

Fleming S. Jackson

Plaintiff-Appellant

v.

Stone and Simons Advertising, Inc., et al.

Defendants-Appellees

ORDER

(Filed May 29, 1974)

Before: Weick, Lively and Engel, Circuit Judges.

The appellees filed a motion to dismiss for lack of jurisdiction, and the motion has been referred to a panel of this court pursuant to Rule 3(ϵ), Rules of the Sixth Circuit. The district court entered summary judgment as to certain defendants in this multiple party action, but reserved judgment as to other defendants. The court did not make the express determination or statement required by Rule 54(b), Federal Rules of Civil Procedure by which the partial summary judgment may be treated as an appealable final judgment. Thus the order of the district court was not a final order within the meaning of 28 U.S.C. § 1291.

It is therefore Ordered that the appeal herein be dismissed for the reason that it is not within the jurisdiction of this court. Rule 8, Rules of the Sixth Circuit.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

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## APPENDIX XIV

No. 74-1490

United States Court of Appeals for the Sixth Circuit
(See Top of Order)

Fleming S. Jackson
Plaintiff-Appellant
vs.
Stone and Simons Advertising Inc., et al.
Defendants-Appellees

ORDER

(Filed February 17, 1975)

On January 23, 1975, an order was entered dismissing this case. Upon sua sponte reconsideration that order is hereby amended to read as follows:

This case has been referred to a panel of this court pursuant to Rule 3(e), Rules of the Sixth Circuit, to consider the appellant's response to a show cause order entered in this case. The District Court entered a summary judgment as to certain defendants in this multiple party action, but reserved judgment as to other defendants. The court did not make the express determination or statement required by Rule 54(b), Federal Rules of Civil Procedure, by which the partial summary judgment may be treated as an appealable final judgment. Thus the order of the District Court was not a final order within the meaning of 28 U.S.C. §1291.



It is therefore Ordered that the appeal herein be dismissed for the reason that it is not within the jurisdiction of this court. Rule 8, Rules of the Sixth Circuit.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

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## APPENDIX XV

Nos. 75-2402
75-2403
75-2404
75-2489

United States Court of Appeals for the Sixth Circuit

Fleming S. Jackson,
Plaintiff-Appellant,
vs.
Stone & Simons Advertising, Inc., et al.,
Defendants-Appellees.

ORDER

Before: Celebrezze, Peck and McCree, Circuit Judges.

This is an appeal from summary judgment for Defendants in consolidated cases alleging copyright infringement and conversion. Appellant, proceeding *pro se* brought suit against numerous individuals alleging that they wrongfully used a song

that he wrote in a television advertisement. Judge Kennedy of the Eastern District of Michigan granted summary judgment in favor of all remaining defendants on both the copyright and conversion claims and Appellant filed notices of appeal.

Appellant has raised a number of arguments challenging the jurisdiction of the District Court to enter the summary judgment which we find to be totally without merit. Appellees have filed a motion to dismiss the appeals because of Appellant's failure to file briefs and appendixes as required by Fed. R. App. P. 30 and 31. Appellant's briefs and appendix were due by the end of January 1976. On April 8, 1976 the Court issued a show cause order to Appellant for his failure to file briefs. On May 7, 1976, in response to Appellee's motion to dismiss, the Court issued another order denying the dismissal action but ordering Appellant to file briefs by April 30, 1976. This deadline was later extended to June 7, 1976. No briefs or appendix having been received from Appellant by this Court, Appellees' motions to dismiss the appeals under Fed. R. App. P. 30, 31 are hereby granted.

Therefore, it is ordered that the appeals in these cases be, and they are, dismissed.

Entered by Order of the Court

JOHN P. HEHMAN, Clerk
/s/ by GRACE KELLER, Chief Deputy

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## APPENDIX XVI

No. 76-2523

United States Court of Appeals
For the Sixth Circuit

Fleming S. Jackson

Plaintiff-Appellant

v.

Stone & Simons Advertising, Inc., et al.

Defendants-Appellees

ORDER

(Filed March 3, 1977)

Before: Weick, Lively and Engel, Circuit Judges.

The plaintiff seeks to appeal from an order of the United States District Court for the Eastern District of Michigan entered August 31, 1976 denying plaintiff's "Motion to Reverse and/or Set Aside and/or Vacate Void Judgments." The judgments characterized as "void" in plaintiff's motion had previously been entered by the district court and had all been appealed to this court. By an order entered August 10, 1976, this court dismissed the appeals. By an order entered September 17, 1976 this court denied plaintiff's motion for reconsideration.

Upon consideration of the entire record before the court it is concluded that this appeal is frivolous and entirely without merit. Rule 9, Rules of the Sixth Circuit. The motion of the defend-

ants-appellees to dismiss this appeal is granted, and the appeal is hereby dismissed at the cost of the plaintiff-appellant.

Entered by Order of the Court

/s/ John P. Helman
Clerk

Issued as Mandate: April 8, 1977

Costs: None

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## APPENDIX XVII

(Tr. pp. 4-5) "* * * Mr. Scott: As to the motion for attorney fees, I would call the Court's attention to 17 U.S.C. which is the copyright statute relating to costs and attorney fees and states—which states that the court shall allow cost, mandatory, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

Two important cases are Cloth v. Hyman, 146 F.Supp. 185 which is the Southern District of New York, 1957—1956 and Burnett v. Lambino, 206 F.Supp. 517, also a Southern District of New York case, 1962 which awarded attorney fees as part of the cost to the prevailing defendant because the plaintiff's claim for infringement was found to lack merit.

The cost cases also point out to award attorney fees where the evidence establishes that plaintiff's real motive was to vex and harass defendant. * * *"

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